

BEFORE THE COUNTY COUNCIL FOR MONTGOMERY COUNTY, MARYLAND  
SITTING AS THE DISTRICT COUNCIL FOR THE MARYLAND-  
WASHINGTON REGIONAL DISTRICT IN  
MONTGOMERY COUNTY, MARYLAND

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IN THE MATTER OF:  
**HAMPDEN LANE, LLC**  
Applicant

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\*\*\*\*\*

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In Opposition to the Application

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Before: Françoise M. Carrier, Hearing Examiner

Zoning Application No. G-819

**HEARING EXAMINER'S SECOND SUPPLEMENTAL REPORT AND RECOMMENDATION**

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## **I. SUMMARY**

The Applicant in this case seeks reclassification to the TS-R (Transit Station – Residential) Zone to build a residential high-rise on Woodmont Avenue in downtown Bethesda. The proposed building would be a maximum of 70 feet tall, with seven stories and 50 to 70 units.

This case comes to the Council following a denial of the application in 2005 (based largely on a proposed maximum height that exceeded the applicable sector plan recommendation of 65 feet), an appeal of the denial to the Circuit Court, and a settlement of the appeal that resulted in a remand to the Hearing Examiner. The Applicant has revised its application by, among other things, lowering the proposed maximum height from 100 feet to 70 feet, reducing the setbacks on the street frontages to achieve a height decrease without sacrificing density, and making a commitment to architectural materials that are consistent with the prevailing brick architecture of surrounding buildings.

The Planning Board and the Alternative Review Committee have found that the proposed development would not be financially feasible, with MPDUs on site, within the constraints of the 65-foot height limit recommended in the sector plan. The Planning Board specifically recommends that the proposed Development Plan be approved with the requested maximum height of 70 feet. Technical Staff makes a similar recommendation, finding that the building as proposed varies only slightly from the sector plan and would be compatible with the surrounding area.

The proposed rezoning is now supported by the Bethesda Civic Coalition and several residents of the Edgemoor Condominium, a nearby residential high-rise, who participated actively in opposition during the earlier proceedings in this case. Conversely, residents of a townhouse development located adjacent to the subject property who participated in support of the original proposal now oppose the application, on grounds that the Applicant should have been held to the three-year waiting period that normally applies after denial of a rezoning request, and on grounds that this proposal, in conjunction with other pending rezoning requests in the immediate area, would have a detrimental effect on their community.

After a careful and thorough review of all the evidence of record, the Hearing Examiner recommends that that proposed rezoning be approved on grounds that it would satisfy the requirements of the zone, it would be compatible with land uses in the surrounding area and, although it would not fully comply with the Sector Plan, on balance, it would serve the public interest.

## II. STATEMENT OF THE CASE

Application No. G-819, filed on February 3, 2004 by Applicant Hampden Lane, LLC, requests reclassification from the R-10 and R-60 Zones to the TS-R Zone of 30,891 square feet of land in the Edgemoor subdivision (7th Election District) comprised of part of Lots 5 and 6, Block 24B; part of Lots 8 and 9, Block 24D; 313 square feet of right-of-way owned by Montgomery County that was formerly part of Lot 6, Block 24B; and 815 square feet of right-of-way owned by Montgomery County that was formerly part of Lots 8 and 9, Block 24D.<sup>1</sup> The site is located at 4802 and 4804 Montgomery Lane and 4901 and 4905 Hampden Lane, Bethesda and is depicted on an identification plat submitted as Exhibit 23(a).

The application was initially reviewed by Technical Staff of the Maryland-National Capital Park and Planning Commission ("M-NCPPC") who, in a report dated May 7, 2004 (the "2004 Staff Report"), recommended *deferral or denial*. The Montgomery County Planning Board ("Planning Board") considered the application on May 13, 2004 and, by a vote of 4 to 1, recommended *approval*, stating that the Planning Board strongly supports this project. A public hearing was convened on June 15, 2004 and continued on June 16, June 22 and September 21, 2004. Evidence and testimony

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<sup>1</sup> The Applicant owns approximately 29,763 square feet of the area proposed for rezoning. This includes 7,217 square feet of land that is already dedicated for roadway use. Based on past practice, the Planning Board can be expected to include the past dedication in the tract area used to calculate permitted density. As noted in the text above, the area proposed for rezoning also includes 1,128 square feet of land that is owned by Montgomery County, having been acquired by eminent domain in the past. This property was previously part of the lots and blocks at issue here. The Applicant hopes to buy this property back from the County, then immediately re-dedicate it for public use in connection with its development of the site. The purpose of this transaction is to give the Applicant a larger tract area for density purposes. Technical Staff testified that while a buy-back and dedication is unusual, it is not unprecedented as a means of increasing permitted density. The Applicant and Montgomery County entered into a Memorandum of Understanding Agency Authorization (Exhibit 26(a)) on April 6, 2004, which authorizes the Applicant to seek rezoning for the County-owned land included in this application, and at least impliedly authorizes the Applicant to seek rezoning for the dedication parcels, to the extent such authorization may be necessary. The Memorandum of Understanding states explicitly that it "shall not affect, in any manner whatsoever, any public action, review or approval process involving the County. . . ." Ex. 26(a) at 3.

were presented both in support of and in opposition to the application. The record was held open for one week to receive the final transcript, and closed on September 28, 2004. It was later reopened to receive two corrected exhibits, and closed immediately on January 5, 2004.

In a Report and Recommendation dated January 7, 2005 (the "January 2005 HE Report"), the Hearing Examiner recommended *approval* of the application. The Council first considered this case on February 8, 2005, and granted a request for oral argument submitted by opposition parties. Oral argument, followed by extensive questioning of counsel by members of the District Council, took place on March 1, 2005. Following this discussion, the Council remanded the case to the Hearing Examiner for the limited purposes of giving the Applicant the opportunity to amend its development plan to specify, as a binding element, that all moderately priced dwelling units ("MPDUs") would be provided on site. Following the reopening of the record, a revised submission from the Applicant and a public comment period, the Hearing Examiner issued a Supplemental Report and Recommendation on March 24, 2005, which recommended *approval* of the application.

The Council considered the application again on April 12, 2005, and voted 9 to 0 to deny the application. There followed a motion for reconsideration by the Applicant, which the Council denied.

The Applicant appealed the denial of the rezoning to Circuit Court. Extensive settlement negotiations then took place between the Applicant and an opposition group that was represented by counsel. In connection with the settlement that ultimately took place, the County Council agreed to remand the case to the Hearing Examiner, to allow the Applicant to submit revised plans consistent with commitments made during the settlement negotiations.

The case was remanded to the Hearing Examiner on January 31, 2006. Following revised submissions by the Applicant, Technical Staff submitted a supplemental staff report on April 18, 2006, recommending approval of the application (the "2006 Staff Report"). A public hearing took place before the Hearing Examiner on April 25, 2006, during which evidence and testimony were presented both in support of and in opposition to the present application. The record was held open for an extensive period to allow time for the Alternative Review Committee (the "ARC Committee") and

the Planning Board to make recommendations, pursuant to Section 59-D-1.61(a) of the Zoning Ordinance, concerning whether building height greater than that recommended in the applicable master plan was necessary to make the inclusion of MPDUs on site financially feasible. Favorable recommendations were received from the ARC Committee on or about May 30, 2006 and from the Planning Board on June 28, 2006. Following notice to interested parties, a 15-day public comment period and the receipt of responsive comments from the Applicant, the record closed on July 13, 2006.

### **III. FINDINGS OF FACT**

For the convenience of the reader, the findings of fact are grouped by subject matter. Where there are conflicts in the evidence, these conflicts are resolved under the preponderance of the evidence test.

#### **A. Subject Property**

The subject property is located in downtown Bethesda, on the west side of Woodmont Avenue. It occupies the entire block between Hampden Lane and Montgomery Lane. The property is currently developed with two single-family detached residential buildings facing Montgomery Lane in the R-60 Zone, which are used for offices; a three-story multi-family building facing Hampden Lane in the R-10 Zone, which contains apartments, an upholsterer and offices; and a gravel parking area filling the middle portion of the site.

The subject property has street frontage on three sides. To the east it fronts on Woodmont Avenue, an arterial road with four to five lanes providing access for north-south traffic in the CBD. Sections of Woodmont Avenue operate in a one-way direction southbound adjacent to the subject property. To the south, the subject property fronts on Hampden Lane, a business district street with two travel lanes providing for east-west travel between Arlington Road and Woodmont Avenue. The right-of-way on Hampden Lane varies, but is recommended in the Sector Plan to be 60 feet. To the north, the subject property fronts on Montgomery Lane, a narrow business district street that is recommended in the Sector Plan for a 52-foot right-of-way. Travel on Montgomery Lane is

primarily two-way east-west, except for a stretch between Woodmont Avenue and a small side street called West Lane, where travel is permitted only in a westbound direction. The subject site is located along the one-way segment of Montgomery Lane.

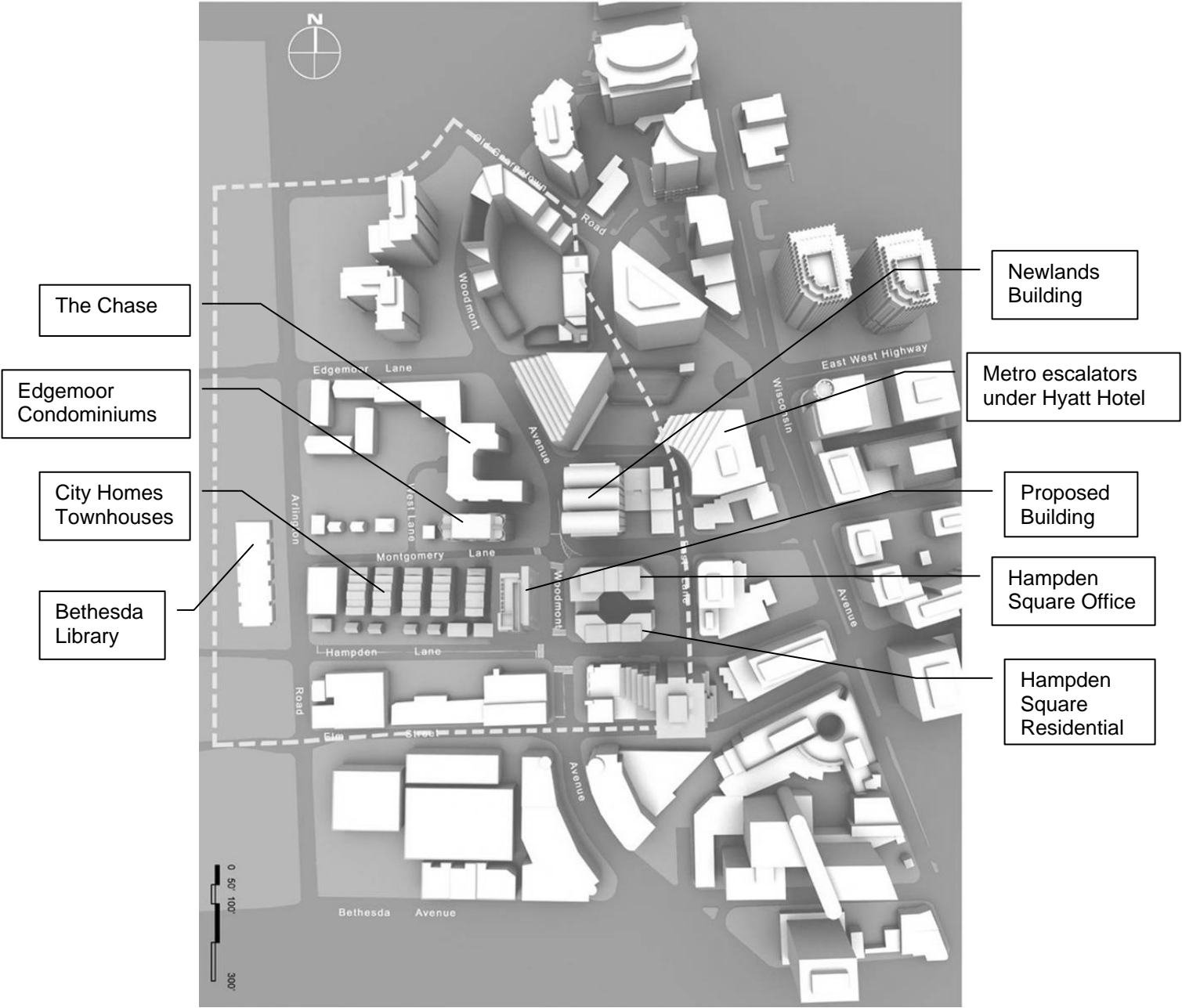
## **B. Surrounding Area**

The surrounding area must be identified in a floating zone case so that compatibility can be evaluated properly. The “surrounding area” is defined less rigidly in connection with a floating zone application than in evaluating a Euclidean zone application. In general, the description of the surrounding area takes into account those areas that would be most directly affected by the proposed development and any special study areas that may be defined by the applicable master plan. In the present case, the Hearing Examiner accepts the recommendation of Technical Staff (see 2004 Staff Report, Ex. 38 at 3) and designates as the surrounding area that area bounded roughly by East Lane on the east, Moorland Lane on the north, Elm Street on the south and properties fronting on Arlington Road on the west. This area includes the Transit Station Residential District (“TS-R District”) defined in the *Bethesda CBD Sector Plan, Approved and Adopted July 1994* (the “Sector Plan”) and a portion of the Metro Core District defined in the Sector Plan. The general location of the subject property and land uses in the surrounding area may be seen on the vicinity map on the next page, which was produced by the Applicant’s architect and has been annotated by the Hearing Examiner, based on detailed testimony during the 2004 proceedings, to identify particular uses. It should be noted that this map depicts the building on the proposed site as originally proposed. As currently proposed, the building would be shorter and have a larger footprint, with smaller setbacks.

The surrounding area as described above contains a mix of uses and zones. Confronting the subject property to the east, across Woodmont Avenue, is Hampden Square, a mixed-use project in the CBD-2 Zone that has two components: a high-rise office building with a height of 143 feet, which occupies the northern part of the site, and a high-rise residential building with a height of 100 feet, which occupies the southern part of the site. Like the subject property, Hampden Square occupies the entire block between Montgomery Lane and Hampden Lane. Confronting the

subject property to the south, across Hampden Lane, is a two-story commercial building in the C-2 Zone occupied by Community Auto Service. Abutting the subject property to the west is a luxury townhouse development known as City Homes of Edgemoor (“City Homes Townhouses”) in the TS-R Zone. The City Home Townhouses consist of five rows of four-story townhouses, 55 to 60 feet in height, which face interior mews (attractively landscaped and paved open spaces).

Surrounding Area Map, Ex. 45(i)





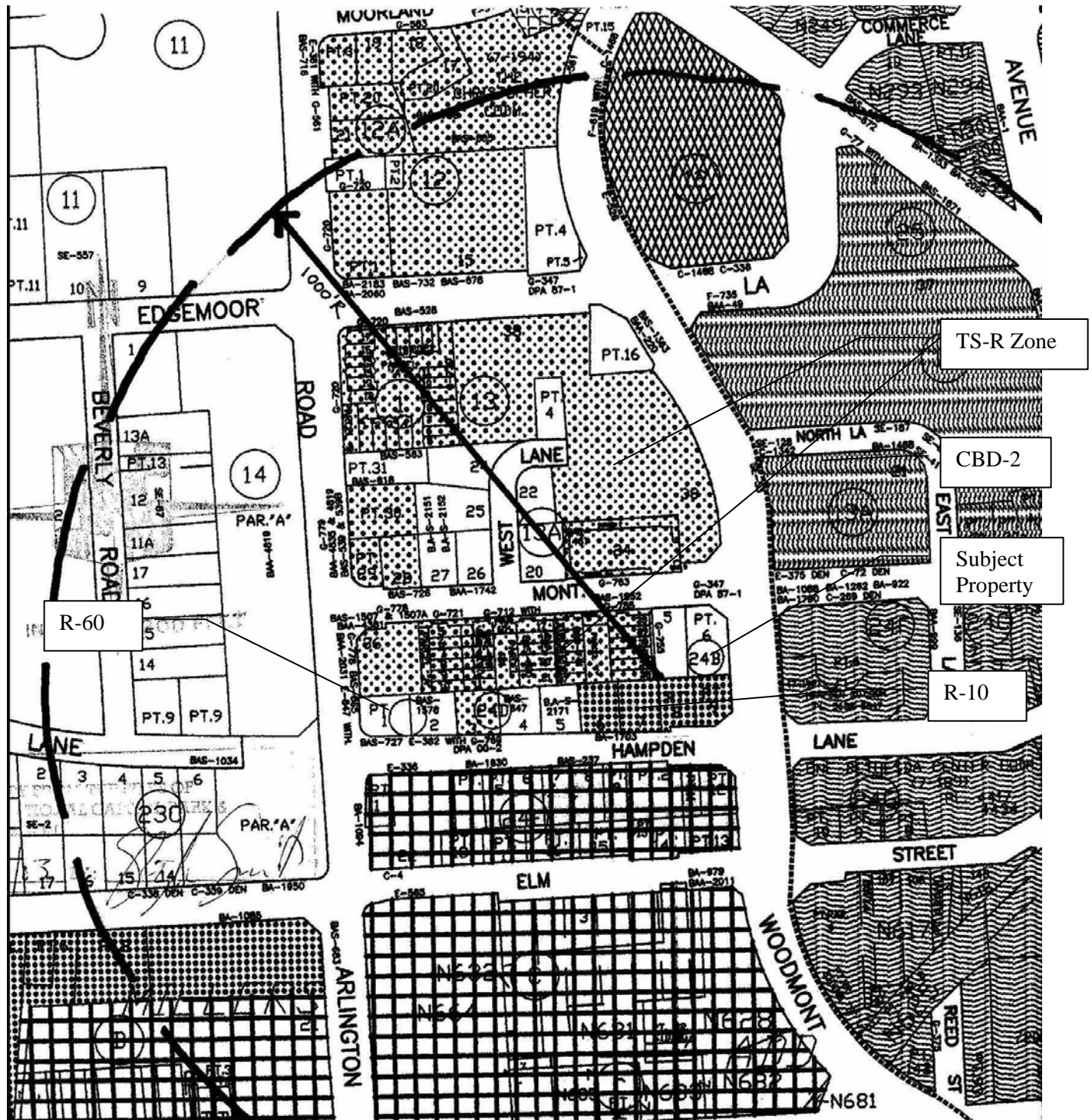
Confronting the subject property directly to the north, across Montgomery Lane, is a small open area. Immediately west of that open area, in the TS-R Zone and partially confronting the subject property, is a high-rise, luxury condominium building known as the Edgemoor Condominiums, which has 10 stories and stands 100 feet high. The proposed building would stand perpendicular to the Edgemoor Condominiums. The Edgemoor Condominiums and the City Homes Townhouses were constructed as related developments, and both have traditional brick architecture with many attractive architectural details. Hampden Square is more modern in its design, but has a similar red brick exterior.

Beyond the adjacent and confronting properties, other important structures in the surrounding area include the Chase apartment building, a 120-foot high-rise that sits about 40 feet north of the Edgemoor Condominiums on Woodmont Avenue in the TS-R Zone. Additional residential high-rises (the Chase II and the Christopher) are located at the far north end of the surrounding area, also on the east side of Woodmont Avenue and in the TS-R Zone. Across Woodmont Avenue from the Edgemoor Condominiums and the Chase is the Newlands Building, a modern high-rise office building in the CBD-2 Zone that has three sections topped with barrel vaults, which vary in height from 173 feet to approximately 220 feet. Farther north on the east side of Woodmont Avenue in the CBD Zones are other buildings over 200 feet in height, which are within the Metro Core District, the tallest height district in Bethesda. These include the Hyatt Hotel and the Clark building. Immediately outside the surrounding area, about 750 feet northeast of the subject property, is the Bethesda Metro Station.

Southwest of the subject property on Hampden Lane are additional low-rise, retail/commercial buildings in the C-2 Zone, with uses such as a gym and a laundry. The buildings on the north side of Hampden Lane contain offices and may include some apartments. On the other side of the subject property, on Edgemoor Lane west of the Edgemoor Condominiums, are single-family residential buildings, mostly in the R-60 Zone, that are primarily used as offices. Arlington Road within the surrounding area is developed with low-rise residential, office and institutional uses. These include the Bethesda Library, townhouses and the "Edgemoor on Arlington Road," a 12-unit

Zoning patterns in the surrounding area are reflected on the zoning map that follows.

### Zoning Map, Excerpted from Ex. 3



Pending development proposals in the immediate vicinity of the subject site include LMA No. G-842, which, in conjunction with DPA 06-2, requests rezoning from the R-60 zone to the TS-R zone for several parcels on Hampden Lane. The application proposes a multi-family residential building, with heights varying from 33 feet at the west end of the building, closer to Arlington Road, to 71 feet at the east end, closer to Woodmont Avenue. This application is currently pending before the District Council, with a recommendation from the Hearing Examiner for a remand due to compatibility concerns. An additional rezoning application is pending, LMA No. G-843, which requests rezoning from the R-60 Zone to the TS-R Zone of several parcels on the north side of Montgomery Lane and continuing onto West Lane, a small side street off of Montgomery Lane.<sup>2</sup> The application proposes a residential building with a height of 41 feet on the Montgomery Lane side and 65 feet on West Lane. The public hearing on this application was postponed indefinitely on April 25, 2006, after Technical Staff and the Planning Board recommended denial of the application due to compatibility concerns.

Photographs of the subject property and surrounding land uses are provided below and on the following two pages.

**Photograph of Subject Property as Seen  
from Balcony of Edgemoor Condominiums, Ex. 50(a), page 2**

Woodmont Avenue



City Homes Townhouses

<sup>2</sup> The Hearing Examiner takes official notice of the case file for LMA No. G-843.

**Photo of Edgemoor Condominiums, Confronting Subject Property, Excerpted from Ex. 45(n)**



**Photograph of City Homes Townhouses, Adjacent to West Side of Site, Ex. 64(d)**



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Photograph of Mews between City Homes Townhouses Building Rows



Photograph of Confronting Development across Hampden Lane from Site



### C. Zoning History

The subject property was classified under the R-10 and R-60 Zones in the 1954 Regional District Zoning. This zoning was reaffirmed in the 1958 Countywide Comprehensive Zoning, and by Sectional Map Amendment in 1977 (SMA G-20) and 1994 (SMA G-711).

### D. Proposed Development

The Applicant proposes to construct a high-rise, multi-family residential building. The application in its current form provides more definite plans than the original application did, as a result of the detailed settlement negotiations that led to the remand proceedings. The TS-R Zone specifies that height must be determined by the Planning Board during site plan review, so the height has not been definitively set. The Applicant has, however, offered binding elements that establish a number of key parameters for the building, including architectural elements. These are summarized below.

#### Binding Elements, per Ex. 116(b)

Area to be rezoned	30,819 square feet
Net lot area	22,546 sq. ft.
Floor area ratio (FAR)	up to 2.5, plus up to 0.55 FAR for MPDU bonus
Number of dwelling units	50 – 70
Gross floor area	no more than 94,218 sq. ft.
Public use space	not less than 10% of net lot area, 2,255 sq. ft.
Active/Passive Recreation Space	Not less than 20% of net lot area or 4,510 sq. ft., percentage on the ground determined by Planning Board
Building coverage	Maximum 65%
Building height	Not greater than 70 feet (7 stories plus English basement), with at least 1,300 sq. ft. in northwest corner limited to 60 feet
	Rooftop structures no more than 15 feet high, setback from Montgomery Lane building edge no less than 25 feet, and covering no more than 50% of rooftop

**Binding Elements, per Ex. 116(b), cont.**

Streetscape	Substantial compliance with Sector Plan guidelines
Parking	Resident parking will be underground, with possible small number of surface parking spaces for drop-off and visitor parking adjacent to Hampden Lane
Ancillary commercial uses or restaurants	None
MPDUs	Up to 15%, all on site
Setbacks	Minimum of 18 feet on western property line.  Other setbacks to be in substantial compliance with setbacks shown on Development Plan.
Access	All vehicular access from Hampden Lane
Materials/Design	Construction materials and architectural design to be consistent with images on Development Plan page A0.03. Northeast and northwest corners to be constructed from brick, metal floor spandrels, and windows, without large expanses of glass curtain wall or other reflective surfaces.
Construction agreement	Applicant to work with Edgemoor Condominium Association to devise construction agreement to mitigate construction impacts.
Condominium fees	Applicant to work with County on funding mechanism to protect MPDU owners from rapid escalations in condominium fees.

The area proposed for rezoning in this case (which is the tract area the Applicant proposes to use to calculate permitted density) is 30,891 square feet, or .71 acres.<sup>3</sup> See Ex. 97(a)

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<sup>3</sup> See note 1, above, for a breakdown of the area proposed for rezoning.

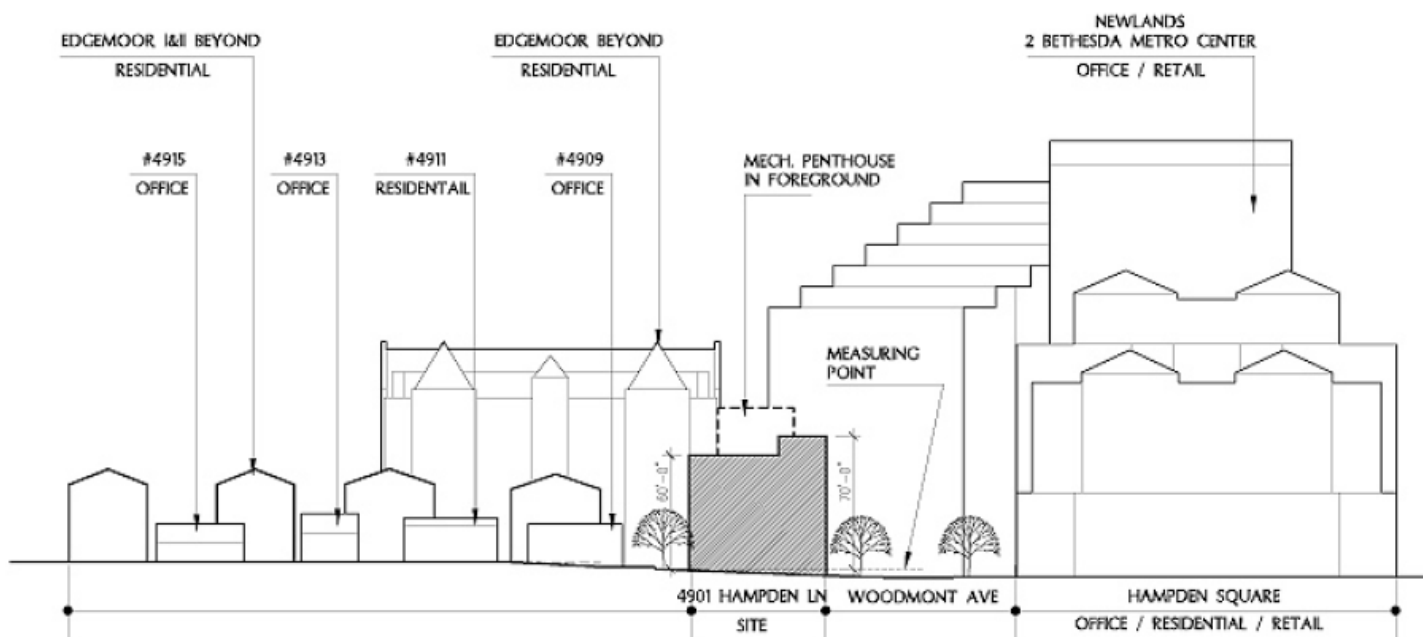


and Ex. 6, “Area Tabulation” portion.<sup>4</sup> With this acreage, a 50-unit building would represent about 70 dwelling units per acre, and 70 units would be about 99 units per acre. See 2006 Staff Report at 12. The project would include at least the minimum number of moderately priced dwelling units (“MPDUs”) required under county law (12.5 percent), and may include up to 15 percent MPDUs, all of which would be on site.

The proposed development would satisfy the zoning ordinance requirements to designate 10 percent of the site to public use space and 20 percent to active and passive recreation space. The latter would likely be provided in part on the ground outside the building, and in part on the rooftop and in interior spaces including a fitness center and a lobby/community room. The breakdown would be determined during site plan review.

Conceptual elevation drawings are reproduced below.

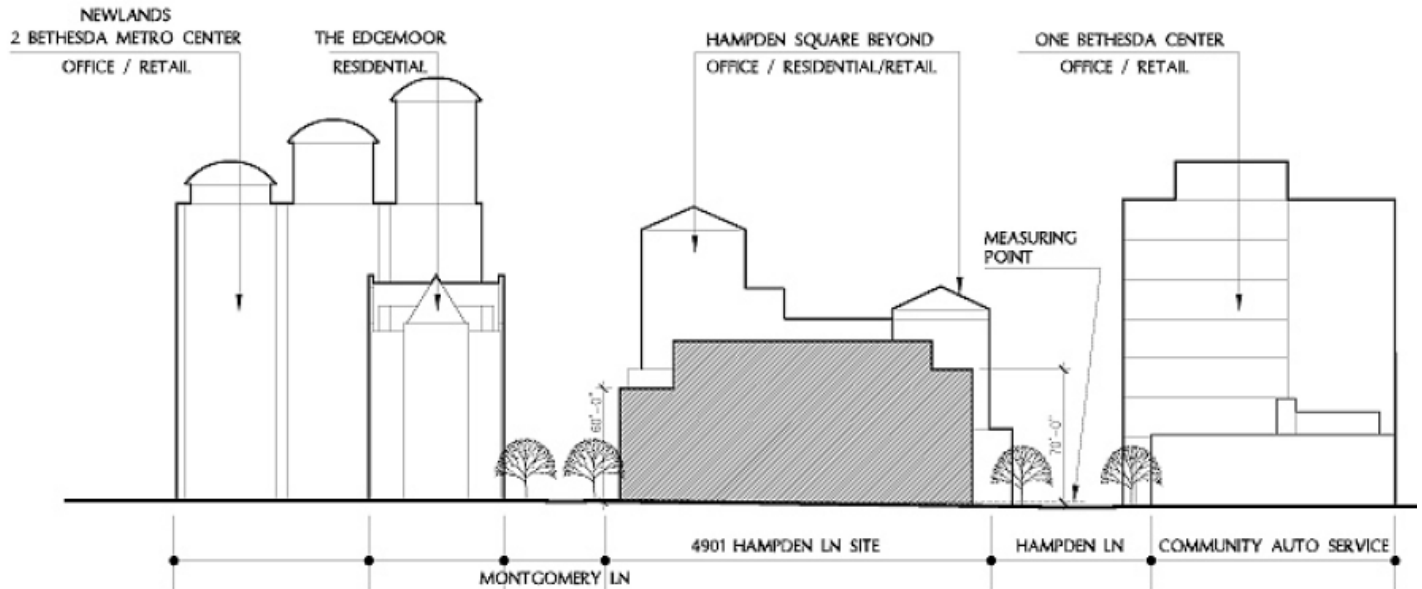
#### Conceptual Hampden Lane Elevation, from Ex. 116(a)



<sup>4</sup> Exhibit 6 should be reviewed with caution, as some of the figures in the graphic portion of the exhibit are slightly inconsistent with figures in the “Area Tabulation” table at the bottom of the exhibit. Applicant’s counsel represented that the figures in the Area Tabulation table are correct. The total discrepancy is seven square feet, which is immaterial at the zoning stage. The Planning Board and its staff will need to verify these figures during site plan review to determine the maximum permitted density precisely.



### Conceptual Woodmont Avenue Elevation, from Ex. 116(a)



### E. Development Plan and Binding Elements

Pursuant to Code § 59-D-1.11, development under the TS-R Zone is permitted only in accordance with a development plan that is approved by the District Council when the property is reclassified to the TS-R Zone. This development plan must contain several elements, including a land use plan showing site access, proposed buildings and structures, a preliminary classification of dwelling units by type and number of bedrooms, parking areas, land to be dedicated to public use, and land intended for common or quasi-public use but not intended to be in public ownership. Code §59-D-1.3. As a general matter, the Development Plan is binding on the Applicant except where particular elements are identified as illustrative or conceptual, and only minor changes may be made during site plan review. The Zoning Ordinance specifies that in the TS-R Zone, building height is to be determined not at the zoning stage, but during site plan review. Code § 59-C-8.51. Thus, building height can only be conceptual at this stage.

In the present case, the proposed development consists of a single building on a small parcel of land. The Applicant seeks to take advantage of the maximum density permitted in the zone in terms of Floor Area Ratio ("FAR"), including the maximum of 2.05 normally permitted plus bonus FAR of 0.55 to compensate for MPDUs. The Applicant proposes to achieve this FAR level with a maximum height of 70 feet (and one corner of the building limited to 60 feet) and maximum building coverage of 65 percent.<sup>5</sup> The remainder of the site would be used for exterior features such as grassy areas, walkways, landscaping, a garage entrance and a service entrance.

As noted above, the textual binding elements on the Development Plan specify that setbacks must be in substantial compliance with specific, numerical setbacks shown on the Development Plan graphics. Applicant's counsel explained that this was a point of negotiation during the settlement agreement, recognizing that it may constrain the Planning Board's ability to require changes during site plan review. The Hearing Examiner notes, however, that if the Planning Board desires to impose a lower height limit on the Applicant at site plan, that could be achieved, without violating the setback commitment in the written binding elements, by reducing the number of units.

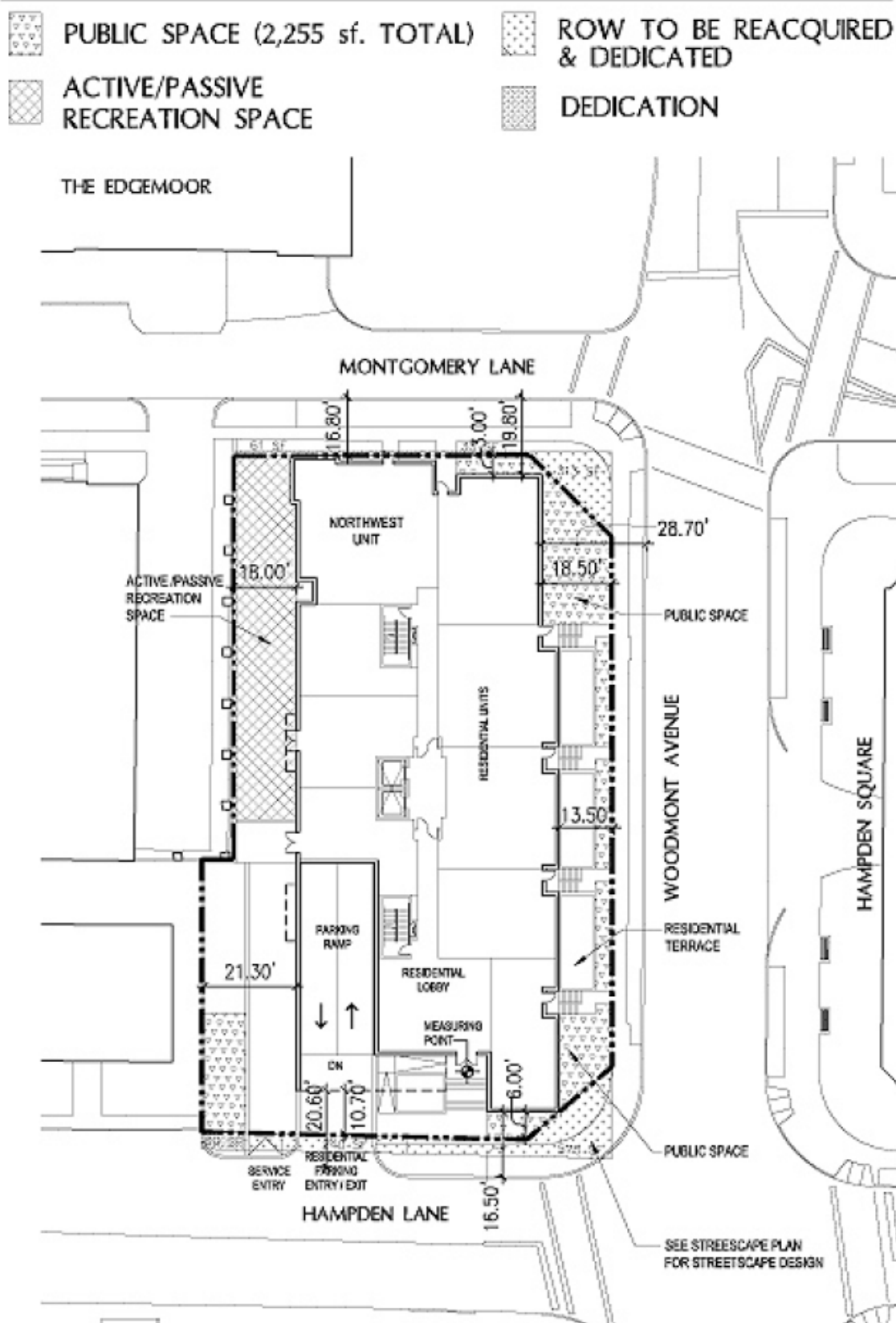
The principal component of the development plan in this case is a three-page document entitled "Development Plan," Exhibits 116(a) – (c), which contain a conceptual drawing of the proposed site plan as well as notes, written binding elements and a conceptual parking layout. Additional items required for a development plan have been submitted in the form of vicinity maps (e.g. Exs. 5, 45(i)). The graphic portion of the Development Plan's site plan is reproduced on the next page, and textual portions are shown on the pages that follow.

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<sup>5</sup> The building shown on the Development Plan occupies just under 65 percent of the site.

**Site Layout (illustrative), excerpted from Ex. 116(b)**

### LEGEND



## Notes and Binding Elements Page One, excerpted from Ex. 116(b)

## 1) Notes.

- a) Subject to the binding elements, below, detailed design features will be finalized at :
- b) Preliminary Mix of Units by Type

Description of Preliminary Mix of Units by Type and Number (Section 59-D-1.3(c)(3))	Number
Studio	6
One Bedroom/Den	4
Two Bedroom/Den	26
Three Bedroom/ Den	22
Total Preliminary Mix	58

## 2) Binding Elements

- a) The development envelope will be governed by the height, setback and other on-site development constraints, as provided on the following tabulation.

Item	Description	Minimum Allowed/ Required Under the TS-R Zone	Proposed/Provided
1.	Zoning (Existing: R10, R60)	N/A	TS-R
2.	Areas to be rezoned and basis for the development density	18,000SF	30,891SF
3.	Net Lot Area	N/A	22,346SF
4.	Floor Area Ratio	No minimum. Maximum: 2.50 FAR	2.50 (Not to exceed)
5.	Bonus FAR for MPDU's	Up to 22%	0.55 (Not to exceed)
6.	Total	N/A	3.05 (Not to exceed)
7.	Number of dwelling units	150 maximum under Zoning; substantial compliance with Sector Plan: 45-100 units per acre.	Between 50-70 Units
8.	Gross Floor Area	N/A	No more than 94,218SF
9.	Public Use Space	10% of Net Lot Area: 2,255SF	Not less than 10% of Net Lot Area: 2,255SF
10.	Active/Passive Recreation Space <sup>1</sup>	20% Of Net Lot Area 4,510SF	No less than 20% of Net Lot Area: 4,510SF.  The area to be provided on the ground will be determined by the Planning Board.
11.	Building Coverage	No minimum or maximum required for the TS-R Zone	Maximum of 65%
12.	Building Height	No minimum or maximum required for the TS-R Zone	Not greater than 70 feet, with portions of the building limited to 60 feet (see section 3.e below).

**Notes and Binding Elements Page Two, excerpted from Ex. 116(b)****3) Additional Binding Elements:**

- a) The streetscape will be in substantial compliance with the Sector Plan guidelines.
- b) All residential parking will be located underground, with the possible exception of a small number of surface parking spaces for drop off and visitor parking located adjacent to Hampden Lane.
- c) No ancillary commercial uses and no restaurants will be included in the Development Plan.
- d) The proposed development will include all MPDUs on site. 15% of the total dwelling units will be MPDUs.
- e) Setbacks and height:
  - i. West side building setback: no less than 18 feet from the westerly property line.
  - ii. Other setbacks: in substantial compliance with the setbacks illustrated on this amended Development Plan, page A0.02, dated May 1, 2006.
  - iii. While the building's overall height will be a maximum of 70 feet (seven (7) stories plus an English Basement), as measured from elevation 326 (the elevations of the southwest and northwest corners of the site), provided that the northwest corner of the building shall be limited to a maximum of 60 feet, approximately in the area over the northwest unit as shown on this amended Development Plan, page A0.02, dated May 1, 2006, but in any event, not less than 1,300 square feet.
  - iv. The remainder of the building will be limited to a maximum of 70 feet in height. Any rooftop structures, including penthouse equipment and screen wall, shall be no more than 15 feet in height. All such structures will be set back from the Montgomery Lane building edge by no less than 25 feet and will cover no more than 50% of the rooftop. All reasonable efforts shall be made to reduce the maximum 15 foot height and the maximum 50% coverage as much as practicable.
- f) Both residential and service vehicular access will be from Hampden Lane.
- g) The building's construction materials and architectural design shall be consistent with the images depicted on this amended Development Plan, page A0.03, dated May 1, 2006. Specifically, the northeast and northwest corners of the building will be constructed from brick, metal floor spandrels, and windows. They will not include large expanses of glass curtain wall or other reflective surfaces.
- h) The Applicant will work with residents of the Edgemoor Condominium Association to devise a construction agreement to mitigate the impact of construction traffic, noise, employee parking, street closures and other relevant issues.
- i) The Applicant will work with the county in an attempt to devise a funding mechanism to help protect MPDU owners from rapid escalations in condominium fees.

<sup>1</sup> Active/Passive recreation space will be provided through a combination of the following: exterior (on the ground) amenity space, interior amenity space and rooftop amenity space.

The Hearing Examiner notes that the percentages of public use space and active/passive recreation space listed in the binding elements are the same percentages required under the development standards for the TS-R Zone. The binding elements serve to underscore those requirements and bind the Applicant to them, in the event that the requirements are made less stringent in the future.

The textual binding elements of the Development Plan require substantial compliance with the images depicted on page A0.03 of the Development Plan, which are shown below and on the next page.

**Artist's Rendering of Woodmont Avenue and Montgomery Lane Facades, from Ex. 116(c)**

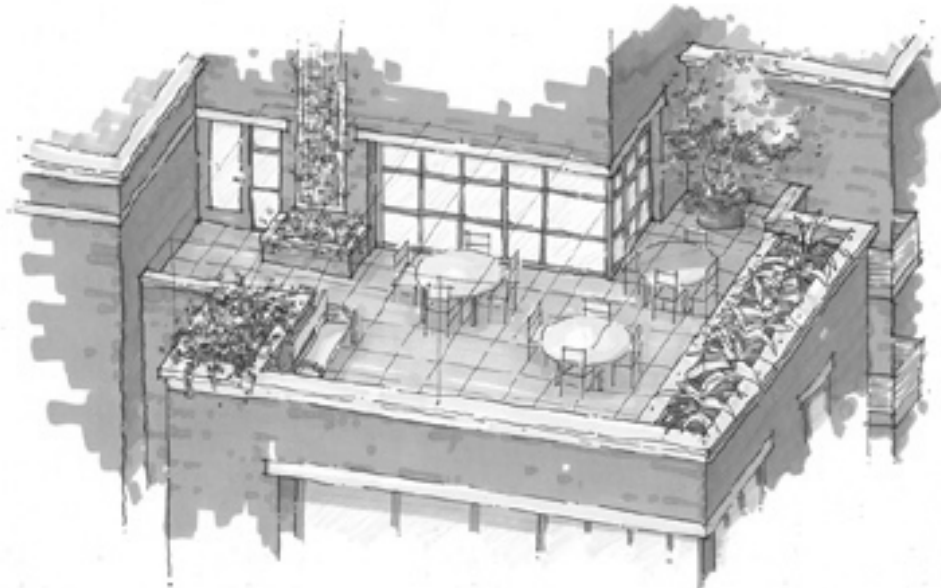


**Artist's Rendering of Facades Facing Montgomery Lane and City Homes Driveway, from Ex. 116(c)**



**Artist's Rendering of Terrace on Roof of 60-foot Portion of Building in Northwest Corner, from Ex. 116(c)**

**Terrace Area to be at least 1,300 square feet in size, per textual binding element.**



## **F. Master Plan**

The subject property is located in the TS-R District of the *Bethesda CBD Sector Plan, Approved and Adopted July 1994* ( "Sector Plan"), as defined in Figure 3.1, Master Plan at 38. Sector Plan compliance was the most hotly debated issue during the 2004 proceedings in this case, which were highly contentious. The January 2005 HE Report described the recommendations of the Sector Plan in detail, and outlined the varying interpretations offered by the Planning Board, Technical Staff, the Applicant's land planner and the Opposition's land planner. See January 2005 HE Report at 21–37, incorporated herein by reference. Given that all parties now agree that the proposed development would be consistent with the Sector Plan (the Opposition having been transformed into supporters, and Technical Staff's sole objection to the plan having been resolved with the reduction in height), this report contains a much briefer description of the Sector Plan.

### **1. Basic Goals of the Sector Plan**

The Sector Plan's goals for the Bethesda CBD as a whole are stated on pages 3-4 of the Plan and reproduced below:

#### **1. DOWNTOWN**

Realize the vision of Bethesda as a diverse and lively downtown for Bethesda-Chevy Chase. Continue well-designed redevelopment within the metro Core and reinforce the physical character and varied activities of districts radiating out from the core so that each district has a distinct identity yet is linked into a coherent whole.

#### **2. URBAN FORM**

Encourage infill development that complements the underlying physical form of Bethesda. Create a high-quality built and pedestrian environment, including a network of pathways and open spaces. Enhance Bethesda's commercial and residential districts with improvements appropriate to the character of each.

#### **3. HOUSING AND NEIGHBORHOODS**

Encourage and maintain a wide range of housing types and neighborhoods in and around Bethesda for people of all incomes, ages, lifestyles, and physical capabilities, in keeping with County goals. Provide an adequate supply of housing, including affordable units, to reinforce Bethesda as a place to live as well as work. Protect adjacent



neighborhoods form commercial intrusion, undue traffic, and environmental degradation.

#### **4. EMPLOYMENT**

Provide opportunities for additional jobs in this major down-County employment center, in keeping with County policy to concentrate growth in the urban ring near Metro stations and to increase the County's revenue base.

#### **5. COMMUNITY CHARACTER**

Enhance Bethesda as an appealing environment for working, shopping, and entertainment. Strengthen its attraction as a destination for visitors while ensuring that residents find a sense of community. Reinforce a unique sense of place through the themes of Bethesda as a 'garden' and 'cultural district.'

#### **6. CIRCULATION**

Provide a safe and functional transportation system to serve the current and recommended land uses. Achieve a significant shift of travel from drive-alone auto use to transit, car-pooling, and other alternatives. Enhance the pleasure, safety, and convenience of walking and bicycling.

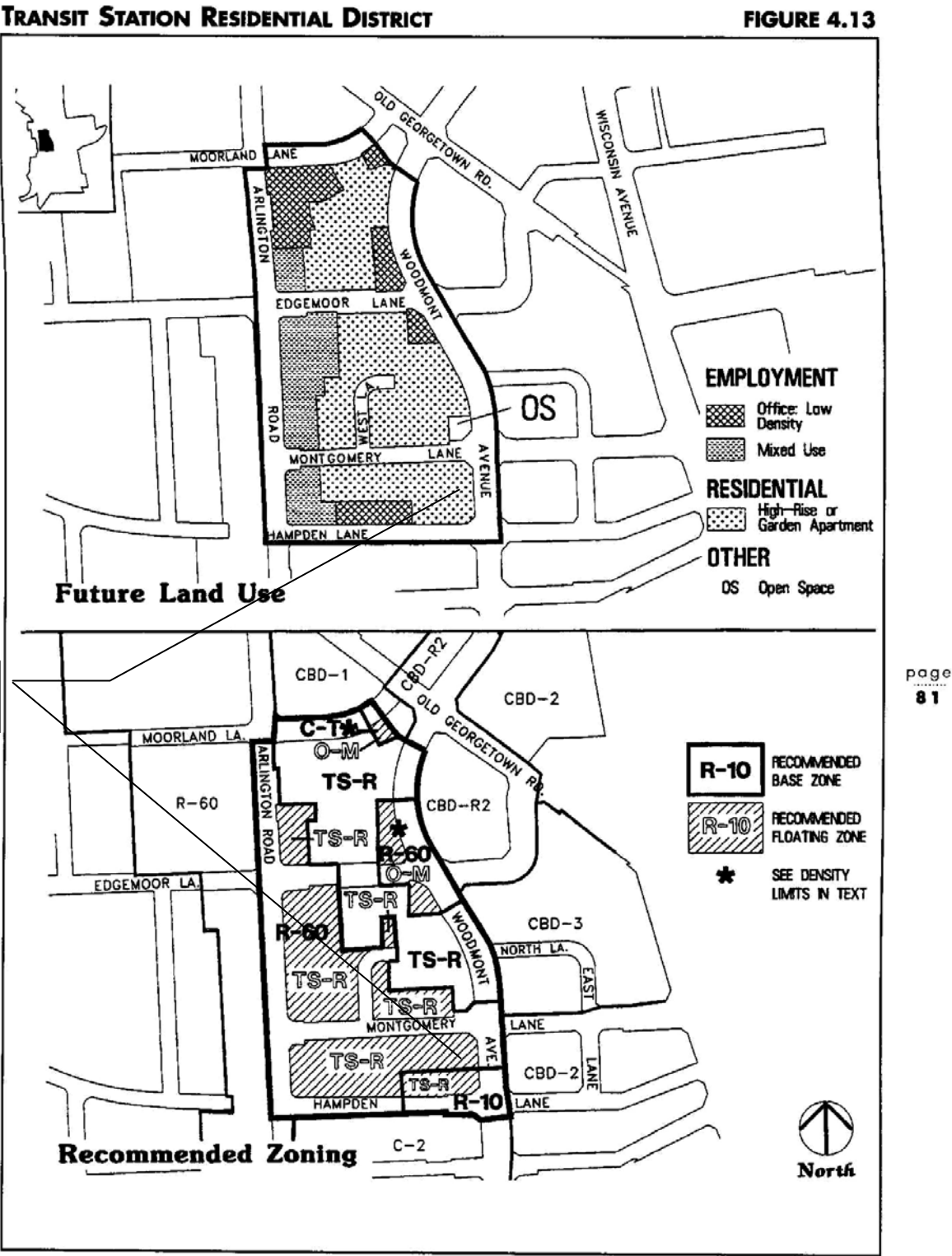
### **2. TS-R District Recommendations**

The Sector Plan's basic vision for the TS-R District is set forth below (Sector Plan at 5):

The Plan recommends creation of a high-density, low-rise 'urban village' that steps down in height from 6 floors along Woodmont Avenue to 3 floors along Arlington Road, and provides from 45 to up to about 100 dwelling units per acre. The Plan retains and revises the TS-R (Transit Station-Residential) Zone to achieve this vision.

The urban village concept was described in detail, with written objectives, extensive written recommendations, urban design guidelines and several maps and drawings, including the drawing on the next page, Figure 4.13. The Recommended Zoning map at the bottom of Figure 4.13 identifies the subject property as appropriate for the TS-R Zone, and refers the reader to the text for density limits. The text recommends a minimum of 45 dwelling units per acre everywhere in the TS-R District except on lots facing Arlington Road, and states that higher densities with 2.5 FAR and "about 100 dwelling units per acre" would be allowed elsewhere in the district. See Sector Plan at 82.

Sector Plan Figure 4.13, Transit Station Residential District



The Hearing Examiner notes that given the wide range of 50 to 70 units proposed in this case, the final development would not necessarily produce a unit density approaching 100 d.u./acre. The Applicant has reserved a flexibility with regard to the number of units that could

produce anywhere between 70 and 100 units per acre, well within the range the Sector Plan recommends.

John Carter of Technical Staff testified during the 2004 proceedings that the range of densities recommended in the Sector Plan should be seen as a step-down or “tenting” concept similar to the height recommendations in various parts of the CBD. Higher densities would be desirable close to Metro, with lower densities further south and east, closer to Arlington Road and nearby single-family neighborhoods. Tr. June 16, 2004 at 113. Mr. Carter opined that a location like the subject site, half a block from Metro, should certainly be developed at the higher end of the density range. Id. at 114. He recited from memory the square footage of the area sought to be rezoned in this case, which is the basis for density calculations – 30,891 square feet, or .71 of an acre. Id. at 114-115. He stated that if the building were constructed with only 40 units, the minimum proposed in the original application, the unit density would be a little low. However, the building would still achieve the maximum FAR, which is another important measure of density. Id. at 115.

Mr. Carter agreed that more units would be better in terms of increasing Metro ridership, but stated that it’s more complicated than just the number of units. Tr. at 116-117. If the building has fewer units but the units are larger, there may be more people living in each unit, resulting in the same number of new residents in close proximity to Metro. In response to questioning by Opposition counsel, Mr. Carter conceded that Technical Staff does not have actual occupancy data indicating whether large, two- or three-bedroom luxury condominiums in fact have more people living in them, or whether the additional bedrooms are more often used as a den or extra room. He noted, however, that parking requirements increase with the number of bedrooms, suggesting an assumption in the Zoning Ordinance that more bedrooms translates into more residents. Tr. June 16 at 118-119.

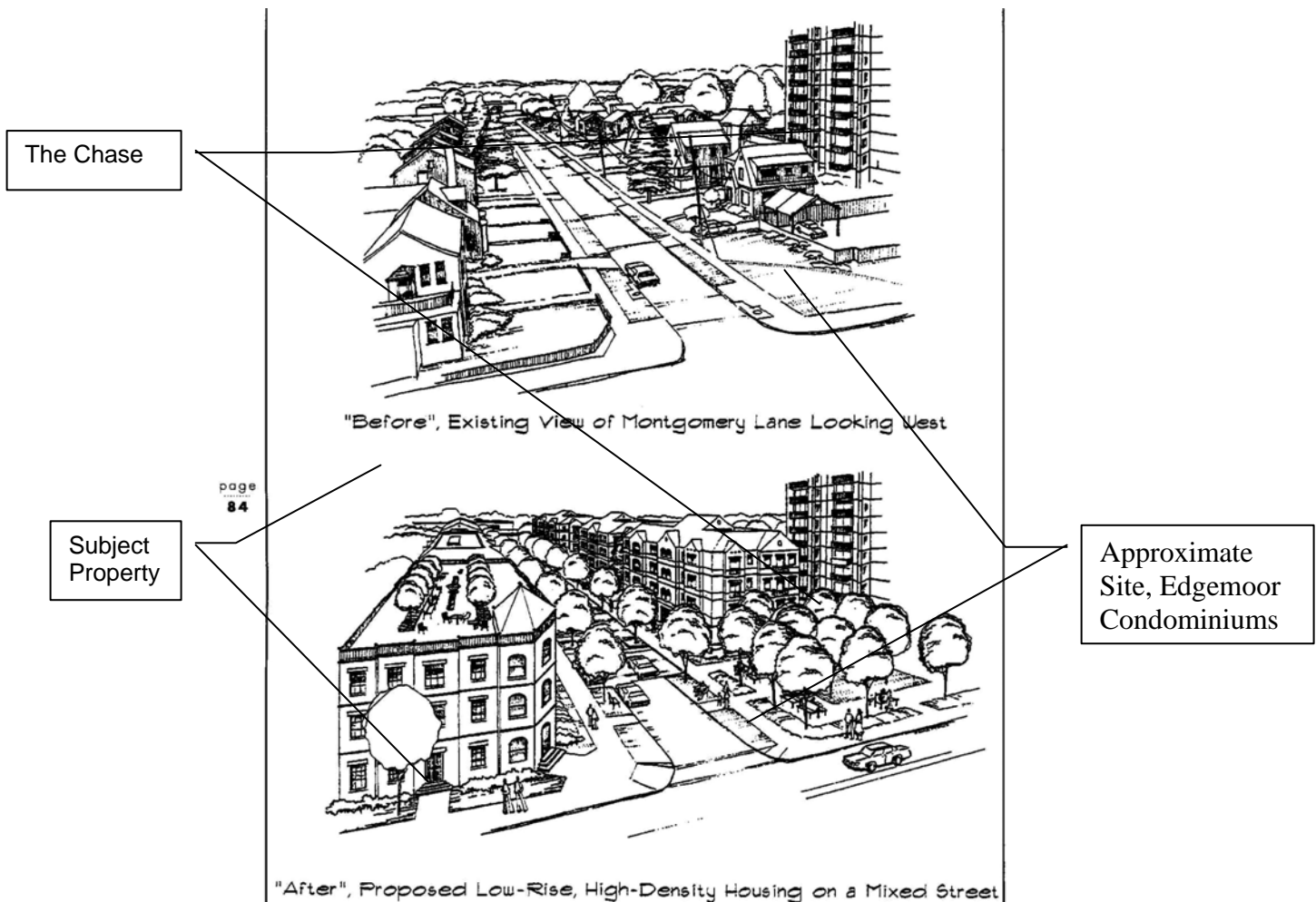
On page 82, the Sector Plan describes the preferred form of development for residential uses in the TS-R District as a low-rise, high-density “urban village.” The type of housing “should appear to be townhouses but actually be three to six-floor buildings with apartments at each level.” The Plan recommends a minimum density of 45 units per acre “everywhere except on lots facing Arlington Road, where there would be no minimum density in order to allow townhouse

development at lower densities." The Plan "anticipates that some projects will incorporate higher densities, and the full 2.5 FAR (about 100 dwelling units per acre) would be allowed."

The Sector Plan notes that the TS-R Zone was amended to provide more flexibility in site design, facilitating implementation of the low-rise, high-density concept. Revisions include a lower minimum parcel size to make assemblage easier, and a reduced green space requirement to permit "lower building heights, a more spread out building, and, therefore, a less expensive structure since construction of such low-rise development can be less costly than high-rise." Sector Plan at 82.

In addition to the text on page 82, the Sector Plan included the illustrative drawing below (Figure 4.15, p. 84), which compares existing development along Montgomery Lane at the time the Sector Plan was prepared with proposed future development. Each of the two views depicts Montgomery Lane looking west from Woodmont Avenue.

**Sector Plan Figure 4.15, Transit Station Residential District: Illustrative**



The Sector Plan also included Figure 3.2, reproduced on the next page, which assigns recommended building height limits to various areas within the Bethesda CBD. The subject property is in an area recommended for a maximum height of 65 feet, which corresponds to six stories, the maximum recommended for the TS-R District in the text. This figure also contains a notation at the bottom, referring the reader to the text for specific height recommendations. This language indicates that Figure 3.2 was intended to be used in conjunction with the textual recommendations, which suggest limiting height to 35 feet along Arlington Road, rising to 65 feet closer to Woodmont Avenue.

In its recommendation on the original application, the Planning Board made note of the fact that under the TS-R Zone, building height is determined during site plan review. See Ex. 42; see *also* Code § 59-C-8.51. The Board noted that “the review of the building height and setback would be carefully considered during the site plan review process . . . the Planning Board will take into consideration the size of the parcel, the relationship of the building to surrounding uses, and the need to preserve light and air for the residents of the development and the residents of the surrounding properties in accordance with the provisions in the TS-R Zone.” Ex. 42.

The Sector Plan also includes Urban Design Guidelines for the TS-R District (p. 85) as set forth below. These guidelines address, among other things, setbacks, sidewalks and streetscape.

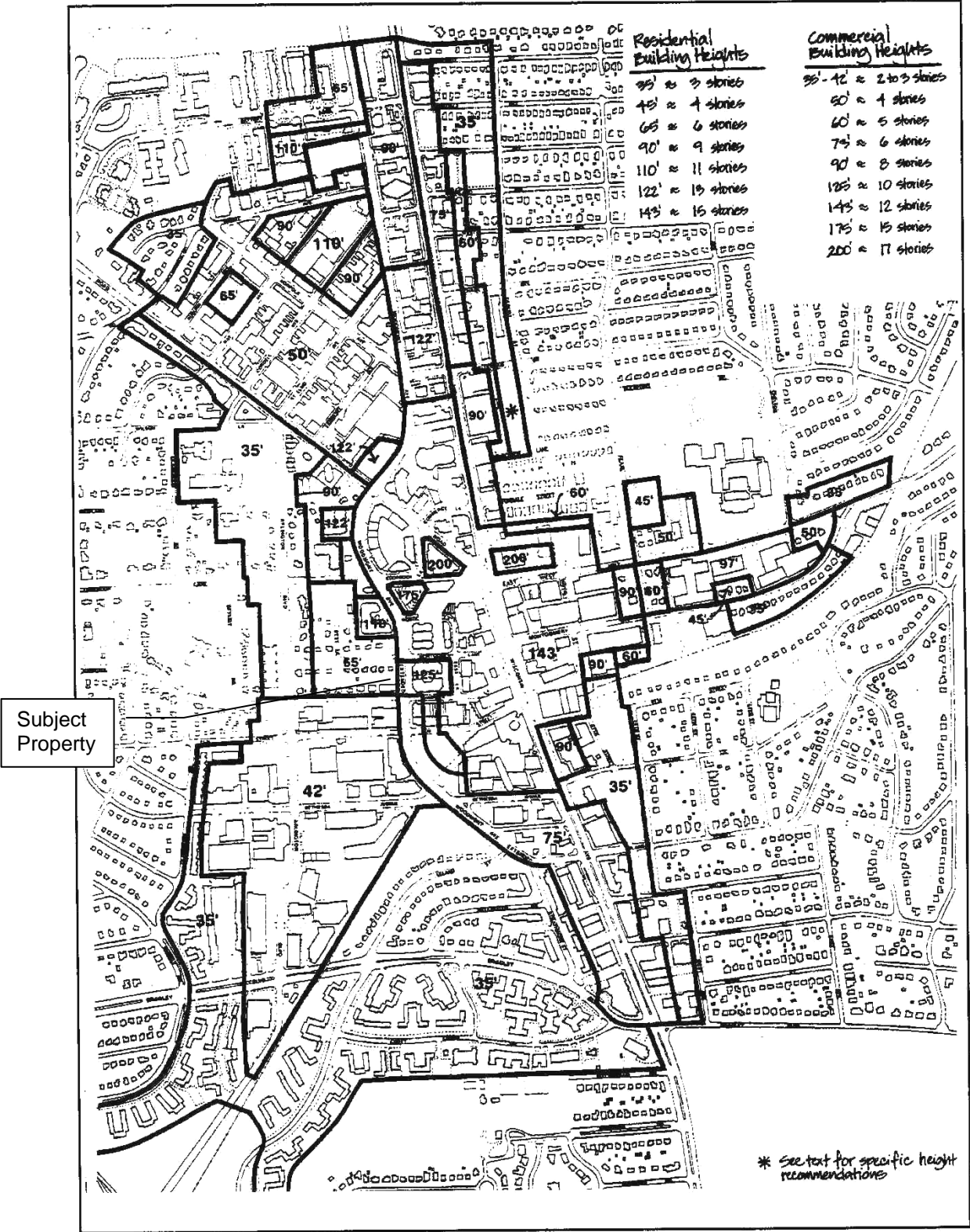
#### **URBAN DESIGN GUIDELINES**

1. Permit projects with a minimum lot size of 18,000 square feet to encourage smaller-scale projects. Projects should not leave isolated parcels.
2. Encourage low-rise buildings to fill out the parcel.
3. Maintain low-rise building heights which step down to three floors along Arlington Road. Heights of up to six floors are preferred near Woodmont Avenue to achieve the desired urban form.
4. Provide 25-foot building setbacks from the curb (15 feet from the Sector Plan right-of-way) along Arlington Road. Setbacks in the remaining portion of the TS-R District will be decided on a case-by-case basis as redevelopment proceeds through the Planning Board approval process.

Sector Plan Figure 3.2, Building Height Limits

**BUILDING HEIGHT LIMITS**

**FIGURE 3.2**



**Urban Design Guidelines, cont.**

5. Design roof tops to achieve a residential image by using hip roofs, gables, turrets, and other types of pitched roof lines. The varied roof line is desirable to improve character and reduce the sense of bulk.
6. Locate front unit entrances along the street when residences are provided on the first floor to encourage street life.
7. Locate required parking either underground or in rear decks, so as not to be seen from surrounding streets.

Finally, the Sector Plan establishes the following additional objectives for the TS-R District (p. 80):

1. Provide incentives for and remove barriers to achieving high-density housing in the TS-R District.
2. Increase flexibility in the TS-R Zone to allow the district to achieve a low-rise, high-density “urban village” pattern.
3. Retain residential scale along Arlington Road.

**I. Public Facilities**

In evaluating the compatibility of a proposed development and whether it would serve the public interest, the District Council must consider whether the development would be adequately served by and/or would have an adverse effect on public facilities. Under the County’s Adequate Public Facilities Ordinance (Code §50-35(k)), the Planning Board has the responsibility, during subdivision review, to assess the adequacy of transportation, schools, water and sewage facilities, and police, fire and health services to support the proposed development. This assessment is guided by parameters that the County Council sets each year in the Annual Growth Policy (“AGP”) and biennially in the two-year AGP Policy Element.<sup>6</sup> While the final test under the APFO is carried out at subdivision, evaluation of public facilities at the zoning stage is particularly important because of the discretionary nature of this stage of the process and the opportunity for a more comprehensive review than may be available at subdivision. The District Council is charged at the zoning stage with determining whether the proposed development would have an adverse impact on public facilities

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<sup>6</sup> See 2003-05 Annual Growth Policy – Policy Element, Resolution No. 15-375, adopted October 28, 2003. The Hearing Examiner hereby takes official notice of the 2003-05 AGP Policy Element.

and, if so, whether that impact would be mitigated by improvements reasonably probable of fruition in the foreseeable future.

### **1. Transportation: Road Capacity**

Under the 2003-05 AGP Policy Element, which remains in effect, subdivision applications are subject to only one transportation test, Local Area Transportation Review ("LATR").<sup>7</sup> The Planning Board recognizes its LATR Guidelines as the standard to be used by applicants in the preparation of reports to the Hearing Examiner for zoning cases. LATR Guidelines at 1. LATR generally involves a traffic study intended to evaluate whether a proposed development would result in unacceptable congestion at nearby intersections during the peak hours of the morning and evening peak periods. Under the LATR Guidelines in effect when this case was filed in February 2004, an LATR study was not required unless a proposed development would generate 50 or more peak-hour trips during the morning or evening peak traffic hour.<sup>8</sup> Under the current LATR Guidelines, adopted in July 2004, the threshold for an LATR traffic study has been lowered from 50 peak-hour trips to 30.<sup>9</sup> Where traffic generation is not expected to reach the specific threshold, the development is considered too small to have a measurable traffic impact on a specific local area. LATR Guidelines at 5; 1998 LATR Guidelines at 2.

In the 2004 Staff Report, Technical Staff estimated that the proposed development would generate less than 50 peak hour trips. Accordingly, under the 1998 LATR Guidelines, no transportation study was required. Neither Technical Staff nor the Applicant addressed the Policy Area Transportation Review ("PATR") requirements that were applicable on the date the present application was filed, perhaps because PATR is no longer required.

The Hearing Examiner finds it somewhat inconsistent to apply the 1998 threshold for an LATR study while operating under the 2004 abolishment of PATR. This distinction appears to be without consequence, however, because even with the maximum of 70 units shown on the current

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<sup>7</sup> See 2003-05 AGP Policy Element at 6-7; *Local Area Transportation Review Guidelines Approved and Adopted July 2004* ("LATR Guidelines") at 1. The Hearing Examiner takes official notice of the LATR Guidelines.

<sup>8</sup> See *Local Area Transportation Review Guidelines Approved and Adopted April 1998* ("1998 LATR Guidelines") at 2. The Hearing Examiner hereby takes official notice of the 1998 LATR Guidelines.



Development Plan, the proposed building is expected to generate only 13 new vehicular trips during each of the morning and evening peak hours, after taking into account that the existing uses on the site generate an estimated 19 peak hour trips.<sup>10</sup> See Petersen testimony, Tr. at 85.

Mr. Carter, representing Technical Staff and the Planning Board, testified during the 2004 proceedings that the Planning Board had recently approved a decision that the Bethesda CBD should proceed to “Stage II” of a multi-step development program contained in the Sector Plan. Technical Staff’s recommendation to move to Stage II was contained in a memorandum that the Applicant submitted into this record during the 2004 proceedings.<sup>11</sup> See Memorandum dated April 2, 2004 from Daniel K. Hardy, Transportation Planning, via John Carter, Chief, Community-Based Planning Division, to Planning Board (“Stage II Memo”), Ex. 76(c). The Sector Plan recommended six near-term objectives for the Bethesda CBD, which were described as Stage I. The Sector Plan “limited Stage I development to 5,000 jobs above the 1993 level, and indicated that long-term growth would add another 11,400 jobs to the Stage I total.” Stage II Memo at 2. Technical Staff noted in the Stage II Memo that all of the Stage I objectives had been met, including the completion of a Comprehensive LATR. Other objectives included reaching Stage I ceiling capacity, establishing a transportation management organization, maintaining a constrained long-term parking policy, increasing the percentage of employees using non-auto transport to 32 percent<sup>12</sup>, and implementing or programming transportation facilities recommended during Stage I. See Stage II Memo at 3-6.

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<sup>9</sup> See LATR Guidelines at 5.

<sup>10</sup> During the 2004 proceedings in this case, the Applicant did not present a traffic expert, but rather relied on Technical Staff’s analysis. Staff did not take into consideration the number of trips generated by existing uses in estimating the traffic impact of the proposed building. Technical Staff did not address traffic issues in the 2006 Staff Report, so the Hearing Examiner relies on the very credible testimony of Applicant’s traffic expert, Stephen Petersen. The Hearing Examiner recognizes that the 2004 Staff Report recommended limiting the number of units to 65, for LATR purposes, but does not find this problematic, given that a deduction for existing trips reduces the traffic impact of the proposed building to well below the threshold for an LATR study.

<sup>11</sup> This material was accepted over the objection of the Opposition, who felt that permitting the Applicant to present additional evidence after deficiencies were identified during the hearing was unfair. To respond to that objection without excluding relevant evidence, the Hearing Examiner granted the Opposition’s request for an additional hearing date, at which the Opposition had the opportunity to question Technical Staff about traffic conditions in the Bethesda CBD and the likely impact of the present project.

<sup>12</sup> The Stage II Memo notes that using a commuter survey to assess employee use of non-auto transport has been criticized because the sampling process was not random. In addition, other available data such as peak period traffic volume and transit utilization counts do not corroborate the survey results. However, in early 2001, the County Council considered several alternative means for assessing non-auto travel for this purpose, and determined that the annual commuter survey remained the most cost-effective. See Stage II Memo at 5.

The Comprehensive LATR took a broader approach to analyzing the likely effects of development projects than LATR studies performed at subdivision. The Comprehensive LATR drew two key conclusions (Stage II Memo at 7):

- The existing and forecasted areawide transportation level of service meets an acceptable AGP standard.
- Reasonable transportation demand management objectives and intersection improvements can be implemented to achieve Stage II development except at three locations in the Bethesda-Chevy Chase Policy Area (Wisconsin Avenue at Jones Bridge Road, Connecticut Avenue at Jones Bridge Road and Connecticut Avenue at East-West Highway).

Because of the three intersections where solutions to high congestion levels have not been identified, Technical Staff recommended that a new ceiling of 5,000 jobs be established for Stage II. This represents about half of the Stage II commercial development envisioned in the Sector Plan. Technical Staff did not recommend a housing ceiling for Stage II, because “housing in the Bethesda CBD tends to generate primarily off-peak direction travel at the three intersections of concern,” all of which are located outside the CBD to the north or east. Stage II Memo at 7. Most residential traffic leaving the CBD tends to travel to the south and west during the morning peak hour, returning to the CBD in the evening without reaching the three problem intersections.

The Applicant submitted into the record a 2004 letter from the Chairman of the Planning Board to the President of the County Council which reports that the Planning Board endorsed Technical Staff’s recommendation to move to Stage II with a cap of 5,000 new jobs, but no cap on housing units. See Ex. 78, third page. The Applicant argues that the Planning Board’s decision to move to Stage II, with no ceiling on residential development, provides a strong indication that traffic conditions in the Bethesda CBD can accommodate the project proposed here. See Ex. 76(c) at 3.

The Opposition in the 2004 proceedings contended that the Applicant had not demonstrated a lack of adverse traffic impacts sufficiently to pass public facilities review at the zoning stage. Their argument was two-fold: (1) because the size of the project exempts it from LATR, no traffic study will be required at subdivision, so the zoning stage is the only opportunity to obtain such a

study; and (2) the Stage II Memo was driven by policy, not by actual improvements in traffic conditions, and it does not constitute a sound basis for concluding that the Bethesda CBD has sufficient traffic capacity to accommodate the proposed development.

The Opposition sought to discredit the Stage II Memo through cross-examination of its principal author, Daniel Hardy of the MNCPPC. Mr. Hardy acknowledged that when the Stage II Memo was written, the Planning Board was looking for documentation to support moving from Stage I to Stage II, “which would have the effect of allowing the board to continue approving development.” Tr. Sept. 21 at 98. Without a move to Stage II, the CBD was in danger of running out of development capacity, meaning that the Planning Board could find itself unable to approve any more development.

Opposition counsel asked Mr. Hardy to review the Montgomery County Annual Development Approval and Congestion Report for 2004 (“ADAC Report”, Ex. 90), which the County Council requested as an aid in prioritizing transportation funding needs. He acknowledged that the ADAC Report identifies ten intersections in the combined Bethesda - Chevy Chase Policy Area (all outside the Bethesda CBD) that have unacceptable levels of congestion, and agreed that adding traffic to those intersections would likely make conditions worse, depending on the direction of travel. *Id.* at 93-95, 97. Nonetheless, failing intersections do not necessarily prevent the policy area from going to Stage II. *Id.* at 99-100. The Sector Plan provides that Stage II can begin when area-wide transportation levels meet acceptable AGP standards, and intersection improvements likely to be needed during Stage II have been identified.

Mr. Hardy acknowledged that for small projects, those generating less than 30 trips under the current LATR Guidelines, when the development gets to subdivision review there is essentially no discussion of traffic. *Id.* at 117-18. He reiterated that Staff did not propose a Stage II ceiling for residential development because the vehicle trips generated by housing in the Bethesda CBD would generally be heading against the peak traffic flow at the three intersections of concern identified in the Stage II Memo.

Under questioning by Applicant’s counsel, Mr. Hardy stated that the limit for acceptable CLV in the Bethesda CBD is 1,800, and confirmed findings in the ADAC Report that CLV counts are

well below that level at three intersections along Woodmont Avenue -- Elm Street, Montgomery Lane and Cordell. Tr. Sept. 21 at 125-26. Moreover, the ADAC Report found no intersections in the Bethesda CBD that are currently operating above the acceptable CLV limit. Mr. Hardy agreed that for a small project in the CBD, Technical Staff would not be looking at intersections near the Beltway to measure traffic impacts, in part because of the difficulty of measuring the traffic impacts of a small development on conditions so far away.

## **2. Transportation: Circulation Patterns and Traffic Safety**

The binding elements specify that resident parking would be provided underground, with all vehicular entrances, for residents and services, on Hampden Lane. Uncontroverted testimony by two experts at the April 2006 hearing, a civil engineer and a traffic engineer, established that the proposed access point on Hampden Lane would be safe and efficient, and that the proposed development would have no adverse effect on vehicular or pedestrian safety in the area of the site.

## **3. Utilities**

The Staff Report and written submissions by the Applicant indicate that water and sewer lines abut the subject property, local service is deemed adequate and the impacts from rezoning would be negligible. See 2004 Staff Report at 5; Ex. 12. No specific information was provided concerning other utilities such as electric, telephone and gas, but in light of the site's location in downtown Bethesda, such services are undoubtedly readily available.

## **4. Schools**

The subject property is located in the Bethesda-Chevy Chase cluster and would be served by Bethesda Elementary School, Westland Middle School and Bethesda-Chevy Chase High School. Based on average yield factors for high-rise, multi-family housing with 65 units, Montgomery County Public Schools ("MCPS") expects the proposed development to generate approximately three elementary school students, one middle school students and one to two high school students. See testimony of Malcolm Rivkin, Tr. at 65. According to MCPS capacity calculations dating from 2004,

enrollment was expected to exceed capacity for the entire six-year forecast period at Bethesda Elementary School, and for most of the six-year forecast period at Westland Middle School (which already had six portable classrooms) and Bethesda-Chevy Chase High School. See *id.* The FY 2005-2010 Capital Improvements Program (CIP) includes a six-room addition to Westland Middle School, which was scheduled, as of the time of the 2004 proceedings, to open in August 2008. This addition will provide relief from overcrowding. The CIP also includes a five-room addition to Bethesda-Chevy Chase High School that was scheduled, as of the time of the 2004 proceedings, to open in August 2009, which will provide relief from overcrowding. See *id.*

The school capacity test under the AGP finds capacity adequate in all clusters for purposes of subdivision review in FY 2007.<sup>13</sup> The Applicant contends that based on this finding, school capacity in the Bethesda-Chevy Chase cluster should be considered adequate to accommodate the proposed development.

The Opposition during the 2004 proceedings argued that the evidence was not sufficient to establish that the proposed development would not have an adverse impact on the public schools. See January 2005 HE Report at 57-59. Opposition counsel questioned Joseph Lavorgna of MCPS and Karl Moritz of MNCPPC about how enrollment projections and capacity calculations are carried out. The evidence established that “adequate” school capacity is defined differently under the Growth Policy than under MCPS methodology, and that the AGP methodology for calculating school capacity results in higher capacity numbers than the MCPS methodology. MCPS compared its capacity calculations to AGP capacity calculations in 2003 and found that MCPS program capacity was about 92 percent of AGP capacity at the elementary and middle school levels, and about 94 percent at the high school level. Thus, if an elementary school were considered to have a capacity of 100 students for AGP purposes, on average, the capacity calculated by MCPS would be 92 students. Tr. Sept. 21 at 19.

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<sup>13</sup> The Hearing Examiner takes official notice of the Planning Board’s memorandum to the County Council that conveys the Planning Board’s June 22, 2006 finding that school capacity is adequate, under the Growth Policy, to support subdivision approval in all clusters in FY 2007, which began on July 1, 2006.

In response to questioning about how the County Council chose the current AGP capacity measurement, Mr. Moritz stated that one concern about using a program capacity measure was that it could result in schools coming under pressure to make programming changes to avoid a moratorium, or it could allow school programming decisions to cause a moratorium. *Id.* at 34. Mr. Lavorgna recalled as one rationale for the AGP method that programming changes from year to year, and the AGP methodology that was adopted would result in more stable numbers over time.

Mr. Moritz acknowledged that the purpose of the AGP test is to determine, for each fiscal year, whether any clusters should be place moratorium. It was not developed to test school capacity for any individual development proposal. *Id.* at 41.

With regard to CIP funding, Mr. Lavorgna acknowledged that projects listed in the CIP are not always constructed in the year in which they are listed. *Id.* at 61. Projects may get delayed if county or state funding does not come through on schedule, but Mr. Lavorgna could not recall any instance when money was not appropriated for a project that has been listed as funded in the CIP.

#### **J. Environment and Stormwater Management**

The proposed development is exempt from forest conservation requirements because the property is less than one acre and the project would not result in clearing more than 30,000 square feet of existing forest. See Ex. 11. Technical Staff reports that a Natural Resources Inventory/Forest Stand Delineation plan has been approved.

The Environmental Staff Report attached to the main 2004 Staff Report states that the subject property lies within an urban watershed management area, where the County Stream Protection Strategy calls for cost-effective stormwater quality controls on sites within the watershed. Tr. June 15, 2004 at 274. Although stormwater management is not part of the binding elements of this application, the Applicant's engineer testified that on-site stormwater management would likely be provided through a structural filtering device located beneath the service drive and connected to the public storm drainage system. The Applicant's engineer testified that groundwater recharge likely would not be required for this site, since it is a redevelopment project, not bare land. Similarly, he

does not expect any stream channel protection (quantity control) measures to be required, due to the size of the property and limited rate of runoff. The Applicant would require approval of its stormwater management plan by the Department of Permitting Services.

### **K. Community Participation**

This section will identify community participation in both phases of this case, to provide a full picture of the considerable community interest in this case.

During the 2004 proceedings in this case, five individuals and the Bethesda Civic Association participated in opposition to the proposed rezoning, with legal representation. Their chief concern was that the proposed 100-foot height would restrict the views from the upper floor of the Edgemoor Condominiums, where each of the five individuals were either residents or owners. All of these parties were party to the settlement agreement that led to these remand proceedings, and they support the present application. They were represented by counsel at the April 2006 hearing, and one of the individuals, Steven Skalet, testified in support.

Three community members testified in support of the original application. Two were residents of the adjacent City Homes Townhouses, including a representative of the City Homes Board of Directors, which stands in opposition to the present application. Owners of the end units abutting the subject property had hired a planner to advise them regarding the original application and, based on his advice, negotiated a memorandum of understanding with the Applicant that set down certain changes the Applicant would make to the building design in exchange for support for the project. One of the key elements was a minimum 18-foot setback between the proposed building and the western property line of the site, adjacent to the City Homes Townhouses. This setback has been maintained on the present Development Plan.

The third community member who testified in support of the original application, Howard Balick, is a resident of the Edgemoor Condominiums who lives on the sixth floor, facing Montgomery Lane. He testified that not all the residents of the Edgemoor Condominiums opposed

the application. He and his wife believed that the building as originally proposed would add to the visual vitality of downtown Bethesda, and they welcomed it. See *also* Balick letter at Ex. 63.

The record contains seven letters in support of the original application. The most detailed is from the Washington Regional Network for Livable Communities (“WRN”), which “advocates transportation investments, land use policies and community designs that enhance existing communities and the environment of the Washington, D.C. region.” Ex. 43. WRN’s goal is a network of walkable communities linked by quality transit and surrounded by greenbelts, with the District of Columbia as the economic and cultural hub of the region. WRN found that the density originally proposed was generally consistent with the site’s location near Metro, and that the height was appropriate in an urban center. WRN would support increased density to improve some of the weaknesses it identifies in the proposed project, and suggests reduced parking as a way to save space, potentially reducing building height and costs. WRN would also encourage the addition of convenience retail or professional office uses to enliven the street, serve area residents and help create pedestrian connections between Old Georgetown Road and Bethesda Avenue.

WRN’s letter was endorsed by the Coalition for Smarter Growth, a network of regional environmental, transit and civic organizations supporting transit, transit-oriented development and new urbanist, walkable communities. See Ex. 44.

Two letters in support of the original application are from residents or owners of units of the Edgemoor Condominiums who believed the building as originally proposed would be a positive addition to the Bethesda streetscape. One noted that when he purchased his unit he fully expected other buildings of similar size to be built nearby, and other buyers should have had the same expectations. See undated letter from Christopher S. Abell, owner of unit 501, Ex. 32. The other writer mentioned the streetscape proposed on the subject site as a welcome green space addition. See letter dated April 22, 2004 from Dr. Bernard Yanowitz, resident of unit 703.

Johanna Neuman, a resident of Hampden Square, writes that the architecture shown on the plans, the premium on green spaces and pedestrian access, and the deep setback from Woodmont Avenue “suggest the potential for a stunning addition to the neighborhood.” Ex. 29. She



dislikes the Edgemoor Condominiums, and feels that a shorter, squatter building on the subject site would rob the area of much needed greenery and pedestrian access. Julie Canard, also a Hampden Square resident, faces the subject site. She believes that the upscale design of the proposed building would add a new, welcome dimension to Bethesda. She objects to the Edgemoor Condominiums, which took up every inch of land possible, and welcomes a building of the same height but with green space and walkways. She also notes that as a realtor, she is aware of a tremendous need for large, luxury condominiums in the heart of Bethesda. See Ex. 37. Don McGlynn lives one block from the subject property on Hampden Lane. See Ex. 30. He writes that the design of the building as originally proposed would bring a breath of fresh air to Bethesda, and its height would allow more green space to be added to Montgomery Lane and Woodmont Avenue. He echoed the comments of other writers in saying that approving the proposed project would be smart growth, giving many new residents the chance to enjoy the pleasures of living in Bethesda, one of the most vibrant areas to live in the Washington D.C. region.

Two letters in opposition to the original application were received from individuals who did not testify in person. Judith D. Heimlich and her husband are residents of the Edgemoor Condominiums who purchased a unit facing Montgomery Lane, at greater cost, with the expectation that the decreasing heights called for in the Sector Plan would preserve their southern exposure and airy, light-filled view. See Ex. 52. They were concerned that the building as originally proposed would adversely affect their view, the glass walls would intrude on their privacy, and the building's sterile, ultra-modern design would be incompatible with the surrounding area. Diane Oakley resides on the 8<sup>th</sup> Floor of the Edgemoor Condominiums. See Ex. 53. She objected to the proposed 100-foot height because it exceeded the 65 feet recommended in the Sector Plan. She was also concerned that the all-glass, see-through design in the current drawings would represent a leap of commercialization on the residential side of Woodmont Avenue, and that without the protections of interior uniformity that a commercial building can impose, residents' individual decorating tastes would become an unwanted part of the local cityscape.

Community participation in the April 2006 hearing consisted of two community members who testified in support of the present application, and two who testified in opposition. Their testimony is summarized in Part IV. below. Both of the community members who testified in support at the April 2006 hearing participated in opposition during the 2004 proceedings, due to the 100-foot height requested at that time. With the building reduced to 70 feet in height, and one section of it further limited to 60 feet, both of these individuals now support the project. See testimony of Steven Skalet, Tr. April 2006 at 95-101; testimony of David Fairweather, Tr. April 2006 at 11-12.

Brent Polkes, a resident of City Homes Townhouses who testified in support of the original application, testified in opposition to the current application and questioned several of the Applicant's witnesses. Mr. Polkes' objections are, in part, procedural. He objects to the settlement agreement that allowed the Applicant to "circumvent" Zoning Ordinance § 59-H-2.23, which prohibits a rezoning applicant from filing a new zoning application for the same property for three years after a denial by the District Council. He further objects to the fact that no one from City Homes Townhouses was a party to the settlement agreement, and contends that he was informed of changes to the proposed development plan, but not of the settlement negotiations. [The Applicant maintains that Mr. Polkes was given detailed information about the proposed changes, and was informed that they were the subject of settlement negotiations. See Virostek testimony, Tr. at 23-27; Ex. 127.]

Mr. Polkes explained that his opposition, in 2006, to a proposal that he supported in 2004 is based, in part, on other developments that have since been proposed in the immediate vicinity of City Homes Townhouses: a large, multi-family residential building, with varying heights reaching 70 feet, which would occupy several lots on Hampden Lane immediately south of City Homes Townhouses (LMA No. G-842, pending with the Council); and a 41- to 65-foot residential building across Montgomery Lane from City Homes Townhouses, proposed to occupy both Montgomery Lane and West Lane frontage (LMA No. G-843, indefinitely postponed following Planning Board recommendation of denial on compatibility grounds).

Jim Humphrey testified for the Montgomery County Civic Federation, which vigorously supports the master planning process and encourages compliance of development projects

countywide with applicable master plans. He recommended that the proposed building be limited to a maximum height of 65 feet, consistent with the Sector Plan.

The record also contains three letters in opposition to the present application. The Board of the Directors of the City Homes Townhouses bases its opposition on several concerns, all of which are “heightened by the prospect of additional development proposed for Montgomery Lane and Hampden Lane and the combined effect on our community.” Ex.126. These concerns are summarized below:

- Compatibility with the adjacent townhouses “is at issue” due to height and bulk.
- Neither the City Homes Board of Directors nor Concerned Families of City Homes has ever supported a seven-story building on the subject site.
- The proposed footprint, extending ten feet farther north towards Montgomery Lane, does not respect the setback of the City Homes Townhouses.
- The settlement agreement between the Applicant and the Bethesda Civic Coalition “was entered into without the knowledge or participation of City Homes and does not represent the views of our community.”
- Circumvention of the three-year waiting period under the Zoning Ordinance, based on a negotiating process “from which City Homes and other interested parties were excluded,” would be inappropriate at this time.

The remaining two letters in opposition to the current application are from residents of City Homes Townhouses. James F. and Regina T. Richards object to “a waiver of the three year waiting period,” arguing that the Applicant should be held to the letter of the law. See Ex. 115. Richard A. Hauser also opposes a “waiver” of the three-year waiting period. See Ex. 114. He maintains that the immediate neighbors should be informed as to the current development plan compared to the original plan to assess the impact on their community, and until then, the Applicant should be held to the prescribed waiting period. See *id.*

#### **IV. SUMMARY OF HEARING**

At the start of the hearing, Brent Polkes, a resident of the adjacent City Homes townhouse development, asked for an explanation of why the case was being heard again, without the three-year wait that the Zoning Ordinance specifies for rezoning requests that the Council has denied. The Hearing Examiner explained that the three-year waiting period prevents the filing of a new application to rezone the subject property, but the present case is not a new application. It is the continuation of the existing case, on remand following an appeal to the Circuit Court. Mr. Polkes complained that the residents of City Homes, which he considers the community most immediately affected by the proposed development, did not have an opportunity to participate in any of the settlement discussions or voice their opinion. He expressed dismay that the County did not consider it a civic responsibility to reach out to the residents of City Homes and consult with them about the settlement, rather than entering into a settlement agreement without the assent of all the affected parties. Following this discussion, the testimony portion of the hearing began.

##### **A. Applicant's Case in Chief**

The Applicant's testimony and stipulations from the earlier proceedings in this case were incorporated by reference. These included extensive testimony from the Applicant's architect, Robert Sponseller; land planner Malcolm Rivkin; and engineer James Hendricks, all of whom testified again during the remand hearing, as summarized below.

1. Steve Virostek, Applicant's representative. Tr. at 22-27.

Mr. Virostek is a partner of the Applicant and the principal owner of its parent company, Triumph Development. He testified that in an effort to get a revised plan approved, the Applicant contacted the opposition from the earlier proceedings and eventually reached a settlement. He stated that the Applicant also contacted residents of City Homes to assure them that in negotiating with the opposition, the Applicant would not jeopardize the agreements and commitments it had made with City Homes. When asked by the Hearing Examiner who he had spoken with at City Homes, Mr. Virostek stated that he had spoken directly with Mr. Polkes about the revisions to the plan during more

than a dozen conversations subsequent to the original hearing, and had sent him copies of the revised plans and construction agreements.

Mr. Virostek further testified that the settlement agreement between the Applicant and the former opposition binds the Applicant to the revised Development Plan that was submitted on remand. He noted that the revised plan continues to show all MPDUs on site as a binding element. He also noted that the proposed project received an Award of Excellence on October 7, 2004, from the Smart Growth Alliance, which is a joint venture of the Greater Washington Board of Trade, the Chesapeake Bay Foundation, the Metropolitan Washington Building's, the Coalition for Smarter Growth and the Urban Land Institution. [The Hearing Examiner observes that based on the October 7, 2004 date, this award must have been given based on the original plan for this project, not the plan currently before the Council.]

Under questioning by Mr. Polkes, Mr. Virostek testified that during the earlier proceedings in this case, he was not aware that if the application was denied, he would not be able to reapply for three years. In response to a question as to whether he had made a copy of the settlement agreement available to City Homes residents, Mr. Virostek stated that he would have to check his records to see whether a copy was actually sent to Mr. Polkes. He noted, however, that he specifically remembers standing in his driveway, describing the settlement agreement to Mr. Polkes, and Mr. Polkes congratulating him on his patience in dealing with the Edgemoor opposition group. Mr. Polkes acknowledged that he, too, remembers that conversation, and others about the Applicant's willingness to continue to protect the interests of City Homes residents. In response to a question as to whether he had ever advised the Board of Directors of City Homes or the Concerned Families of City Homes that settlement discussions were going on with the Edgemoor opposition group, Mr. Virostek answered "absolutely." Tr. at 26-17. He could not recall whether such notification was provided in writing, but stated that he had discussed it with Mr. Polkes a dozen times. Mr. Polkes recalls conversation with Mr. Virostek about changes to the plans, but does not recall any specific mention of settlement discussions. Tr. at 27.

2. Robert Sponseller, architect. Tr. at 27-60.

Mr. Sponseller was previously designated an expert in architecture, and his designation was continued for purposes of the remand hearing. He reaffirmed his statements and expert opinions from previous testimony.

Mr. Sponseller described the changes to the proposed project since the earlier hearings. The principal change is a reduction in the height of the building from 100 feet to 70 feet for most of the building, and 60 feet for a portion at the northwest corner. In addition, the traffic circulation pattern has changed. Previously, the plans showed a drop-off court and vehicular entrance for residents on the north side of the building, off of Montgomery Lane, with a service entrance on the south side, off of Hampden Lane. The current plan shows all vehicular access on the south side of the site, off of Hampden Lane, which is a two-way street, unlike Montgomery Lane. The building footprint is larger, with a maximum building coverage of 65 percent, compared to 60 percent on the original plans. Mr. Sponseller indicated that as shown on the current plans, the building occupies just under 65 percent of the site.

Mr. Sponseller observed that the current plan still provides activation of the street frontage along Woodmont Avenue, and maintains the direct entrances into units on the ground floor and a portion of the active/passive recreation area. He noted that the footprint of the building is larger now, and as a result, the setbacks are smaller on three sides. The setback on the west side of the building, abutting City Homes, has been maintained at 18 feet from the property line, as it was on the original plan. Mr. Sponseller also described changes to the “skin” of the building, which was previously all glass and aluminum. Under the current plan, only the east side of the building, facing Woodmont Avenue, is still glass and metal. The glass tower that was formerly shown on the north side of the building, facing the Edgemoor Condominiums, is now planned as a brick tower with windows. A similar combination of brick and glass is planned for the south side of the building, facing Hampden Lane, and the west side of the building, facing City Homes. These basic architectural parameters are governed by a binding element that commits the Applicant to a building design

consistent with an artist's rendering of the Woodmont Avenue and Montgomery Lane facades. See Ex. 116(c).

Mr. Sponseller described one particular feature of the building that is designed to soften its impact on residential structures immediately to the north and west. As noted above, most of the building would be 70 feet tall, but a portion in the northwest corner steps down to 60 feet, with a roof terrace on top. The binding elements specify that the portion that steps down to 60 feet in height will measure at least 1,300 square feet.<sup>14</sup> Tr. at 37.

Turning to the unit count, Mr. Sponseller stated that the unit range has been modified, from 40 to 65 units under the original plan to 50 to 70 units under the current plan. He indicated that the proposed range of 50 to 70 units corresponds to 65 to 100 units per acre. Tr. at 38.

Mr. Sponseller opined that, from an architectural standpoint, the proposed building design and configuration would be compatible with surrounding buildings. He observed, in particular, that with a lower height and the same 18-foot setback on the west side of the building, the new plan is a win-win for residents to the west, and the greater height along Woodmont is appropriate. Mr. Sponseller noted that decreasing the amount of glass facing residential properties also contributes to the compatibility of the new plan. He also opined that the size and configuration of the current plan provide for a building that is "exactly what's asked for in the Sector Plan." Tr. at 42.

Mr. Sponseller noted that the proposed development would continue to meet all the Sector Plan guidelines in terms of landscaping, tree plantings, etc., and would continue to provide at least ten percent of its public use space on the ground, with a portion of the recreational space on the ground and the rest inside the building. Mr. Sponseller explained that the exact amount of public use space and recreational space provided on the ground would be determined during site plan review.

With regard to site circulation, Mr. Sponseller stated that the residents' vehicular entrance point has been moved to Hampden Lane, with the service entrance/loading area in the same

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<sup>14</sup> Mr. Sponseller pointed out that the artist's rendering showing the northwest corner of the building depicts a rooftop terrace that is smaller than the minimum 1,300-square-foot area required under the binding elements. Thus, in reality the portion of the building with a 60-foot height would be larger than depicted on the rendering. Tr. at 53.

location as before. He suggested that the Applicant would seek permission for a drop-off area on the street, in front of the building. Parking remains below-ground, as on the original plan.

In response to questions from the Hearing Examiner, Mr. Sponseller explained that the building height would be measured to the highest point of the roof, which would be considered a flat roof. The binding elements limit rooftop structures such as mechanical equipment to a maximum height of 15 feet. Mr. Sponseller indicated that the standard height for such equipment is 18 feet. The binding elements also limit rooftop structures to covering no more than 50 percent of the rooftop. Mr. Sponseller stated that typically, buildings of this type have rooftop structures covering 30 to 45 percent of the roof area. [Applicant's counsel noted that under Section 59-B-1.1 of the Zoning Ordinance, rooftop structures may not have a total area greater than 25 percent of the rooftop, unless approved by the Planning Board. Counsel indicated that the 50 percent figure was the result of settlement negotiations. Counsel also noted that because the TS-R Zone has no height limit, the provisions of 59-B-1.1 for exemption from height limits do not apply in this case. Height would be determined and approved at site plan, per the requirements of the zone under § 59-C-8.51.]

In response to questioning by Mr. Polkes, Mr. Sponseller described in detail the difference in the setbacks on Montgomery Lane between the original and current plans. He noted that in both plans, the building is shown with two setback dimensions on Montgomery Lane. On the original plan, those dimensions were 28 feet and 45 feet. On the current plan, they are 16.8 feet and 20 feet. Mr. Sponseller conceded that he was not familiar with the setbacks of other buildings along Montgomery Lane, so he could not compare the setbacks proposed in this case with those farther up the street. He did observe that under the original plan, the proposed building would have sat farther back from Montgomery Lane than the City Homes building, while under the current plan, the proposed building would sit approximately five to seven feet closer to the street than the City Homes townhouses. Tr. at 56.

Mr. Sponseller acknowledged that in the earlier hearings in this case, he testified that a building with a 65-foot height would have some disadvantages compared to the 100-foot height that was proposed at that time. Tr. at 58. He explained that the earlier comparison was to a 65-foot



building with a larger footprint than the building the Applicant proposes. The current plan proposes a building with more articulation of the exterior than was shown during the earlier comparison, plus less coverage on the ground floor, making a more attractive building. Tr. at 59-60.

2. Malcolm Rivkin, land planner. Tr. at 60-78.

Mr. Rivkin was previously designated an expert in land planning, and his designation was continued for purposes of the remand hearing. He testified that he agrees with the 2006 Staff Report. He noted that two major factors to consider: (i) housing production in Bethesda is still short of demand; and (ii) market demand in Bethesda is extremely high. Mr. Rivkin stated that the Sector Plan anticipated that about 4,000 units of housing could be absorbed in 8 to 11 years after the plan's adoption, but in fact, only about 1,350 units have been built since the plan was adopted.

Turning to the Sector Plan's specific recommendations, Mr. Rivkin opined that the density proposed under the present plan is consistent with the Sector Plan recommendation of 45 to 100 units per acre, and that the proposed building configuration is consistent with the Sector Plan recommendation for low-rise, high-density urban village development. He described the current plan as "much closer to that image" than the original plan. Tr. at 63. Mr. Rivkin opined that the streetscaping proposed along all of the street frontages would be consistent with the Sector Plan's recommendations. He observed that the height currently proposed for this building would be consistent with the Sector Plan recommendation for a step-down in height from taller buildings closer to the Metro – it would be considerably lower than the Edgemoor Condominiums across Montgomery Lane and the Hampden Lane Building across Woodmont Avenue. Mr. Rivkin stated that the massing of the building as now proposed would complement City Homes to the west and the Edgemoor Condominiums to the north, and would be much closer to the concept drawing on page 84 of the Sector Plan than the original building design. Mr. Rivkin considers the relationship between the proposed building and surrounding buildings to be compatible, including the proposed public space.

Mr. Rivkin testified that the potential for an additional five units in the proposed building, compared to the original proposal, would not result in an adverse impact on the public schools. He noted that a building with 70 units would generate approximately five to six students in

grades K through 12, which is the same number expected from a 65-unit building. Tr. at 65-66. Mr. Rivkin also observed that the Planning Board has found school capacity adequate, under the Growth Policy's definition, to support subdivision approval in all clusters for FY 2006.

Mr. Rivkin completed his direct testimony by opinion that the proposed project is in substantial compliance with the use and density indicated by the Sector Plan; complies with the purposes, standards and regulations of the TS-R Zone; provides for the maximum safety, convenience and amenity of residents; would be compatible with existing development; would provide adequate open space and public use space; and would serve the public interest. With regard to the public interest, Mr. Rivkin specifically noted that the proposed development would provide needed housing, including MPDUs on site, all within walking distance of the Metro, which is very much in the public interest given the high price of gas these days. In addition, it would provide better streetscape and pedestrian access to the Metro for residents of the area generally, not just residents of the proposed building.

Mr. Polkes asked Mr. Rivkin to provide a definition of the term "low-rise, high-density," which he used several times during his testimony. Mr. Rivkin referred to pages 80 to 85 of the Sector Plan, and to his own experiences with European architecture, and suggested that the term refers to buildings of three to six stories, close to the street, with views to the street. He read into the record Sector Plan language calling for buildings up to six floors near Woodmont Avenue, stepping down to three floors along Arlington Road. Mr. Polkes stated that he is an insurance broker, and insures tens of thousands of multifamily units. He stated that for insurance purposes, a low-rise building is one that does not exceed 40 feet in height, mid-rise goes up to 90 feet and high-rise is above that. Tr. at 70-71.

Mr. Rivkin affirmed that as Chairman of the Citizen's Advisory Committee for the Sector Plan, he always favored the "low-rise, high-density" approach recommended in the plan. He explained, however, that he was not opposed to the original plan for a 100-foot building on the subject site because he felt that because of the 100-foot Edgemoor Condominium building, the "low-rise, high-density" concept was dead in the TS-R area. He added that at this point, with a low-rise, high

density building proposed on the subject site, and other similar projects proposed in the TS-R district, he believes the project proposed in this case is total compatible with existing and proposed development in the area.

On re-direct, Mr. Rivkin opined that the maximum height of 70 feet now proposed on the subject site is within the “margin of error” relative to the Sector Plan recommended maximum height in the TS-R District of 65 feet. Tr. at 74.

3. James Hendricks, engineer. Tr. at 78-84.

Mr. Hendricks was previously designated an expert in civil engineering, and his designation was continued for purposes of the remand hearing. He reaffirmed his statements and expert opinions from previous testimony.

Mr. Hendricks opined that the access shown on the current plans, from Hampden Lane, would be safe and efficient. He noted that the entrance is shown 90 feet from the intersection of Woodmont Avenue, which provides adequate sight distance to meet county standards, and that Hampden Lane is a two-street that allows ingress and egress to and from the site in either direction. (Mr. Hendricks noted that while there is no pre-determined standard for the minimum safe distance between such an access point and an intersection, in practice he would consider something in the neighborhood of 50 feet to be a practical minimum.) Mr. Hendricks further opined that the proposed vehicular and pedestrian circulation system would be safe and efficient, and that the proposed development would have no adverse impacts on the local transportation network.

Mr. Hendricks stated that the change in design from the original plan would not result in any extensive grading. He also responded to a question Mr. Polkes had asked earlier regarding whether putting the proposed building closer to Montgomery Lane would affect sight distance for drivers exiting the adjacent City Homes driveway. He noted that sight distance is assessed based on what is visible to a driver from a point six feet from the curb. The proposed building would sit approximately 17 feet back from the curb, based on binding elements shown on the Development Plan. As a result, Mr. Hendricks concluded that the location of the proposed building would not interfere with sight distance for drivers exiting the adjacent City Homes driveway.

4. Stephen Petersen, transportation planner. Tr. at 83-91.

Mr. Petersen was designated an expert in transportation planning and traffic engineering. Mr. Petersen did not participate in the original hearings in this case, but he testified that he “scanned through” the voluminous documents provided by counsel, and is familiar with testimony provided in the earlier proceedings.

Mr. Petersen noted that the revised development plan provides for a larger number of units than originally proposed, which might have resulted in a requirement for a full traffic study: based on standard trip generation rates, a 70-unit multi-family building would be expected to generate 32 trips during each of the morning and evening peak hours, two more than the minimum that requires a traffic study. He pointed out, however, that the subject site is currently occupied by two small houses that are used for office purposes, plus a 12-unit apartment building with some commercial space on the ground level.<sup>15</sup> Subtracting the existing traffic coming to the site from the 32 trips expected from the proposed building, the net increase in traffic is only 13 trips, which is even less than the number contemplated during the earlier proceedings (discussions of traffic during the earlier proceedings did not take into account the existing traffic generation).

Assessing the proposed access, Mr. Petersen noted that the existing uses have access from Woodmont Avenue, which is by far the busiest street on which the subject property has frontage. He stated that removing access points into the site from Woodmont Avenue would improve traffic conditions by removing one point of conflict. Mr. Petersen described Hampden Lane as a better access point than Montgomery Lane, because it allows movements into and out of the property in either direction, giving drivers direct access to both Woodmont Avenue and Arlington Road. He also noted that Hampden Lane has much lower traffic volumes than Woodmont Avenue, making it a better location for site access.

Mr. Petersen stated that he is not aware of any intersections in the immediate vicinity of the subject site that operate above the acceptable CLV limit. He opined that the proposed

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<sup>15</sup> Mr. Petersen characterized the ground floor space as office use, for purposes of estimating traffic, which he described as more conservative than treating it as retail. Tr. at 85.

development would have no adverse impact on the transportation network, and would probably improve traffic conditions by eliminating one driveway from Woodmont Avenue.

Mr. Petersen concurred with Mr. Hendricks that the location of the proposed building, approximately 17 feet from the curb on Montgomery Lane, would not adversely affect sight lines for drivers exiting the adjacent City Homes driveway. He stated that a building could interfere with a driver's sight line if it were right up on the sidewalk, but with a 17-foot setback, in most cases the entire vehicle would be forward of the building when a driver pulls up to the curb to exit.

Mr. Petersen also concurred with Mr. Hendricks that the location of the site access point, 90 feet from the intersection of Hampden Lane and Woodmont Avenue, would be safe.

In response to a question from Mr. Polkes about whether sight lines from City Homes could be blocked by trucks parking illegally in front of the proposed building, on Montgomery Lane, Mr. Petersen stated that trucks can interfere with sight line, but that has nothing to do with the building setback. He suggested that even if trucks park illegally on the street, there would still be a "window of visibility" between the proposed building and the street.

### **C. Community Support**

#### **1. David Fairweather. Tr. at 11-12.**

Mr. Fairweather is a resident of the Edgemoor Condominiums who submitted photographic evidence and presented testimony in opposition to the plan that was originally presented for the Council's consideration. He testified at the remand hearing in support of the application and presently configured, noting that the Applicant has made considerable changes.

#### **2. Steven Skalet. Tr. at 95-101.**

Mr. Skalet testified on behalf of himself and his wife, Linda Skalet, and also as a co-chair of the Bethesda Civic Coalition, which opposed the original application for this project. Mr. Skalet voiced strong support for the present proposal, describing it as a good and fair result for all parties concerned. He suggested that the project would be a very good result for the County, because it would result in a new building close to Metro Center, and would avoid leaving the site

underutilized. Mr. Skalet stated that the current proposal offers a better building, both aesthetically and in terms of height, and preserves the urban village concept from the Sector Plan. He declared that if a 100-foot building had been constructed on the subject site, it would have had a domino effect throughout the urban village area.

Mr. Skalet characterized the proposed project as a good deal for the developers, because they have come to believe that the current plan will, in fact, result in a better building. He described the proposed project as good for the neighbors, as well. For one thing, it has had the salutary effect of new projects in the area being proposed within the 65-foot height limit specified in the Sector Plan.

Turning to the sight line issue raised by Mr. Polkes, Mr. Skalet commented that the proposed building, with a setback of approximately 17 feet, would be roughly in line with the brick building stoops of the City Homes townhouses facing Montgomery Lane. Mr. Skalet expressed puzzlement that residents of City Homes supported the original application, but are opposed to the current plan. He emphasized that in the negotiations he participated in with the Applicant, the Applicant always took the position that the commitments it had made the City Homes residents had to be protected. Moreover, not only did they maintain the promised 18-foot setback from the City Homes property, with the access moved the Hampden Lane, the strip of land abutting City Homes is now planned as a passive green space, rather than the entrance to a parking garage, which is a big improvement for City Homes residents.

In response to questioning by Mr. Polkes, Mr. Skalet confirmed that he lives on the ninth floor of the Edgemoor Condominiums, and that a 70-foot building on the subject site will have less impact on his view than a 100-foot building, because his unit sits higher than 70 feet. He stated that there are 52 units in the Edgemoor Condominiums, and he thinks 12 of them are above the level of a 70-foot building, all but one of which have some windows facing south or east. Mr. Skalet stressed that all the units on the south and east sides of his building would be affected by the proposed development, and that even for units on the lower floors, a shorter building on the subject site is better.

### **D. Opposition**

1. Jim Humphrey, Montgomery County Civic Federation. Tr. at 15-19.

Mr. Humphrey testified that the Montgomery County Civic Federation vigorously supports the master planning process and encourages compliance of development projects countywide with applicable master plans. He stated that the transit station residential zone is not a typical Euclidean zone with standardized height limits, but is a zone where height limits are established in the master plan. Mr. Humphrey noted that local real estate laws now require home buyers to be given the opportunity to review the applicable master plan before making their purchase, so they can see what type of development is anticipated for the area. He suggested that this exercise is somewhat meaningless if developments such as the one proposed in this case are not required to adhere to the height limits recommended in a master plan. Accordingly, Mr. Humphrey urged the Council to require that the proposed development be limited to a height of 65 feet.

2. Brent Polkes, City Homes resident.

Mr. Polkes testified on behalf of himself and his life partner, Sheryl Starron. He did not seek to speak on behalf of the Board of Directors for City Homes, or the group Concerned Families of City Homes, because he did not provide ten days' notice pursuant to the Hearing Examiner's rules of procedure. However, he indicated in response to a question that he decided to testify in opposition after meeting with two of the three Board members and other members of the community.

Mr. Polkes testified that although he supported the original application in this case in 2004, he opposes the present application because circumstances have changed. He acknowledged that Mr. Virostek, on behalf of the Applicant, has dealt with City Homes in good faith and kept all of his promises. Nonetheless, Mr. Polkes stated that in his view, the Applicant received full consideration of its original application, and "in a scenario which was done to the exclusion of the residents of City Homes of Edgemoor, there is now an effort to circumvent what was clearly and continues to clearly be the statute regarding zoning applications or reapplications." Tr. at 103. Mr. Polkes objected to a process that allowed this case to come back before the Council without fair warning to affected

citizens. He believes that the Applicant should have been held to the three-year waiting period that normally applies following denial of a rezoning application.

Mr. Polkes elaborated on the basis for his concerns, stating that if this project goes forward, his four-story townhouse community (the Hearing Examiner notes that evidence during the original hearing in this case established that the City Homes townhouses have four stories, but their height is 55 to 60 feet) will be faced with a 60- to 70-foot building to the west. Moreover, as Mr. Rivkin alluded to earlier in the hearing, there is a rezoning request pending for a project on Hampden Lane, abutting City Homes to the south, that proposes a building 71 feet high, plus the mechanical penthouse. (The Hearing Examiner notes that Mr. Polkes refers to LMA No. G-842, which is pending before the Council.) In addition, a rezoning application has been filed to permit another 65-foot building across Montgomery Lane from City Homes to the north, on West Lane and Montgomery Lane. (The Hearing Examiner notes that Mr. Polkes refers to LMA No. G-843, the public hearing for which was indefinitely postponed in April, 2006, following a Planning Board recommendation of denial.) Together, these developments would leave City Homes surrounded by taller buildings on three sides that would “all but destroy our quality of air, light and whatever else we now enjoy.” Tr. at 106. Mr. Polkes explained that it is these changing circumstances, in large part, that have led City Homes residents to oppose the present application.

## **V. ZONING ISSUES**

Zoning involves two basic types of classifications: Euclidean zones and floating zones. The term “Euclidean” zoning arose from the seminal United States Supreme Court case upholding the land use authority of local governments, *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926). Euclidean zoning divides the territory of a local jurisdiction into zoning districts with set boundaries and specific regulations governing aspects of land development such as permitted uses, lot sizes, setbacks, and building height.

A floating zone is a more flexible device that allows a legislative body to establish a district for a particular category of land use, with regulations specific to that use, without attaching that



district to particular pieces of property. Individual property owners may seek to have property reclassified to a floating zone by demonstrating that the proposed location is appropriate for the zone, i.e., it satisfies the purpose clause for the zone, the development would be compatible with the surrounding area, and it would serve the public interest.

The TS-R Zone is among the floating zones that provide for design specifications as part of a development plan. An applicant is afforded considerable design flexibility if development standards for the zone are satisfied. Pursuant to Code §59-D-1.11, development under the TS-R Zone is permitted only in accordance with a development plan that is approved by the District Council when the property is reclassified to the TS-R Zone. If approved, the development plan will provide basic design parameters for the site, much as the Zoning Ordinance provides design specifications for more rigidly applied zones. Normally, a development plan is expected to contain sufficient precision to fix the land use, height, density and bulk of the proposed development, which are basic components of compatibility, and to provide design specifications that govern all post-zoning reviews. In the TS-R Zone, however, the function of the development plan is altered somewhat by the provision that classifies building height as an element to be determined during site plan review, rather than at zoning. See Code §59-C-8.51.

In the case at hand, which involves a single building on a small parcel of land, building height is inextricably linked to setbacks and density. If the setbacks are made larger, the building height must increase in order to maintain the same density. Conversely, if the setbacks are decreased, a lower building height can achieve the same density. As noted in Part \_\_, however, where the textual binding elements of the Development Plan require substantial compliance with setbacks shown on the same plan, the Planning Board can still require a reduction in height by also reducing density.

Because the Development Plan establishes the fixed elements of the application, evaluation of zoning issues will begin with the development plan and proceed to the requirements of the zone itself.

### A. The Development Plan

Before approving a development plan, the District Council must make five specific findings set forth in Code § 59-D-1.61. These findings relate to consistency with the master plan and the requirements of the zone, compatibility with surrounding development, circulation and access, preservation of natural features, and perpetual maintenance of common areas. The required findings are set forth below in the order in which they appear in the Zoning Code, together with the Hearing Examiner's analysis.

- (a) ***That the zone applied for is in substantial compliance with the use and density indicated by the master plan or sector plan, and that it does not conflict with the general plan, the county capital improvements program or other applicable county plans and policies.***

After a careful review of all of the evidence pertaining to the Sector Plan, as detailed in Part III.F above and in the January 2005 HE Report, the Hearing Examiner agrees with Technical Staff's view that the Sector Plan recommended multi-family residential use for the subject property, which is fully consistent with the present application. The Hearing Examiner also agrees with Technical Staff that while densities toward the higher end of the recommended density range (45 to 100 d.u./acre) would be desirable at a location so close to Metro, any level of unit density within that range should be considered in substantial compliance with the Sector Plan. Here, the Applicant proposes a unit density of between 70 and 99 d.u. acre, which is within the range recommended in the Sector Plan.

Technical Staff noted, during the 2004 proceedings, that FAR is another important measure of density, and that compliance with the Sector Plan is more than just a simple question of unit density. The Sector Plan specifically recommended a minimum density of 45 units per acre everywhere in the TS-R District (as defined in Figure 3.1, Master Plan at 38) except along Arlington Road, and "anticipates that some projects will incorporate higher densities, and the full 2.5 FAR (about 100 dwelling units per acre) would be allowed." Sector Plan at 82. The quoted language clearly reflects an expectation that the maximum FAR and a unit density of 100 d.u./acre would go hand in hand – the Sector Plan did not anticipate a use such as one of the possible outcomes here, namely a

building with a full 2.5 FAR (plus MPDU bonus) but only 50 dwelling units, for a unit density of 70 d.u./acre. Nonetheless, the Hearing Examiner agrees with Technical Staff that the 2.5 FAR and any unit density between 45 and 100 d.u./acre can be considered in substantial compliance with the Sector Plan. The Plan did not explicitly state that 2.5 FAR should not be permitted with less than about 100 d.u./acre, and *substantial* compliance is just that – compliance with the essential requirements, not with every detail.

Based on the preponderance of the evidence, the Hearing Examiner concludes that the proposed Development Plan would be in substantial compliance with the use and density indicated in the Sector Plan and would not conflict with any other applicable county plan or policy. Compliance with the Sector Plan as a whole will be discussed in a later section.

- (b) ***That the proposed development would comply with the purposes, standards, and regulations of the zone as set forth in article 59-C, would provide for the maximum safety, convenience, and amenity of the residents of the development and would be compatible with adjacent development.***

### **1. Intent and Purposes of the Zone**

The TS-R and TS-M Zones are intended to be used as follows, per Section 59-C-8.21:

- (a) Both the TS-R and TS-M zones are intended to be used in transit station development areas as defined in section 59-A-2.1, and the TS-R zone may also be used in areas adjacent to central business districts, within 1,500 feet of a metro transit station.
- (b) The TS-R zone is intended for locations where multiple-family residential development already exists or where such development is recommended by an approved and adopted master plan.
- (c) The TS-M zone is intended. . . .
- (d) In order to facilitate and encourage innovative and creative design and the development of the most compatible and desirable pattern of land uses, some of the specific restrictions which regulate, in some other zoning categories, the *height, bulk and arrangement of buildings and location of the various land uses are eliminated* and the requirement substituted that all development be in accordance with a plan of development meeting the requirements of this division. [emphasis added]

The subject property is located less than 750 feet from the Bethesda Metro Station, in an area designated in the Sector Plan as the Transit Station Residential District (defined in Figure 3.1,

Master Plan at 38). Accordingly, The Hearing Examiner finds, based on the preponderance of the evidence, that the proposed reclassification would be consistent with the intent of the TS-R Zone.

The purpose clause for the TS-R Zone, found in Code §59-C-8.22, is set forth in full below, with relevant analysis and conclusions following:

- (a) To promote the effective use of the transit station development areas and access thereto;
- (b) To provide residential uses and certain compatible non-residential uses within walking distance of the transit stations;
- (c) To provide a range of densities that will afford planning choices to match the diverse characteristics of the several transit station development areas within the county; and
- (d) To provide the maximum amount of freedom possible in the design of buildings and their grouping and layout within the areas classified in this zone; to stimulate the coordinated, harmonious and systematic development of the area within the zone, the area surrounding the zone and the regional district as a whole; to prevent detrimental effects to the use or development of adjacent properties or the surrounding neighborhood; to provide housing for persons of all economic levels; and to promote the health, safety, morals and welfare of the present and future inhabitants of the regional district and the county as a whole.

The Hearing Examiner finds that the proposed rezoning and development would promote the effective use of and access to the TS-R District by doing exactly what the second paragraph of the purpose clause states – providing a residential use within walking distance of Metro. As Staff noted during the 2004 proceedings and Mr. Rivkin affirmed during the April 2006 hearing, the sidewalk and streetscape improvements that would be part of this development would improve pedestrian connections to the Bethesda Metro station.

The purpose clause calls for a range of densities near Metro stations, to allow for development appropriate to each Metro area. The range of densities provided for in this case, 70 to 99 units per acre, would add a second high-density project in the TS-R District, which has mostly been developed with projects of more moderate density. The range of 50 to 70 units, in a building of the size proposed, would match the characteristics of downtown Bethesda by providing a level of housing consistent with what the evidence suggests is a strong market demand.

Paragraph (d) of the purpose clause sets forth a purpose to “stimulate the coordinated, harmonious and systematic development of the area” and “prevent detrimental effects to the use or development of adjacent properties or the surrounding neighborhood.” These elements effectively make compatibility of the rezoning with the surrounding area an element of the purpose clause. Accordingly, compatibility will be discussed at this juncture.

In light of the more definitive building parameters established on the current Development Plan, Exhibit 116(b), assessing compatibility under the current application is a much simpler task than under the original application. The Applicant proposes a residential building with 50 to 70 units, up to 70 feet high, with one corner limited to 60 feet; rooftop structures limited to 15 feet in height and no more than 50% of the rooftop surface, with a setback of at least 25 feet from Montgomery Lane; architectural materials that are similar to the prevailing brick architecture of nearby buildings; vehicular access from Hampden Lane, avoiding the one-way-traffic complications of Montgomery Lane; streetscape in substantial compliance with the Sector Plan; and setbacks of at least 18 feet from the western property line, approximately 17 to 20 feet from the curb of Montgomery Lane to the north, approximately 13.5 feet from the property line along most of Woodmont Avenue to the east, with the northeast corner setback at approximately 18.5 feet from the property line and 29 feet from the curb, and approximately 16.5 feet from the curb of Hampden Lane to the south.

The 2006 Staff Report finds that the building as now proposed would be compatible with adjacent and nearby development, including the Edgemoor Condominiums; taller, mixed-use developments across Woodmont Avenue; and low-rise commercial development across Hampden Lane. See Ex. 109 at 11. Staff found that although the proposed building would be taller than the City Homes Townhouses, it would be compatible with them, as well as with the existing three-story apartment buildings on Hampden Lane, because it would provide sufficient setbacks to allow light and air, and would be very close to the height limits recommended in the Sector Plan. See *id.* Staff also concludes that the range of densities proposed is consistent with the range recommended in the Sector Plan, and would be compatible with adjacent development.

The Hearing Examiner finds that the nature of the use proposed here -- multi-family residential -- is clearly compatible with the residential uses in the adjoining buildings. The use is also compatible with non-residential uses, which would benefit from a larger pool of residents to provide customers, employees, etc. Under the current configuration, compatibility of the proposed structure is equally clear. The shape of the subject property dictates that any building of significant size must face Woodmont Avenue, perpendicular to the Edgemoor Condominiums. This avoids the compatibility problems that presently exist between the Edgemoor Condominiums and the adjacent building to its north, the Chase Building, which run parallel to one another with very little space in between. Because of its orientation on the site, the proposed building would extend the line of high rises down Woodmont Avenue in a fashion quite harmonious with the Edgemoor Condominiums, while continuing the step-down in heights typically found in downtown Bethesda as one moves away from the Metro. The proposed building would inevitably interfere with the views from the middle floors of the Edgemoor Condominiums, but the same would be true of any building on the site that is consistent with the Sector Plan.

The Hearing Examiner agrees with the testimony of the Applicant's land planner, Mr. Rivkin, that the development now proposed for the subject site represents a "win-win" situation for the adjacent City Homes Townhouses to the east, compared to the original proposal. Previously, City Homes residents negotiated a promise with the Applicant to maintain a setback from their property line of at least 18 feet. In exchange, they supported the application for a 100-foot building. If the proposed development proceeds as currently envisioned, the City Homes Townhouses will keep the 18-foot setback, but with a much shorter building to their west. The Hearing Examiner is not persuaded that moving the proposed building closer to Montgomery Lane works a material detriment to City Homes Townhouses, compared to the enormous benefit of a building that would be 30 to 40 feet shorter, and much more compatible from an architectural standpoint. The unease felt by residents of the City Homes Townhouses in the face of multiple rezoning requests on three sides of their community is understandable. However, any expectation on their part that the neighborhood would not change over time, or that all future development would follow their lead in terms of height and density, rather than

the recommendations of the Sector Plan, was unrealistic. Moreover, there is no guarantee that either of the other two rezoning requests currently pending will be approved; one has been recommended for a remand by the Hearing Examiner, and the other is in limbo following a Planning Board recommendation of denial.

Having considered all the evidence of record, the Hearing Examiner is persuaded that the proposed building, with the setbacks, site configuration and height limitations shown on the Development Plan, would be very compatible with the City Homes Townhouses. The new building would be only 10 to 15 feet taller, which is completely appropriate for a structure facing Woodmont Avenue, and would be separated from the townhouses by a grassy strip at least 18 feet wide, plus the 30-foot width of the townhouse driveway. The new building might extend closer to the street than the townhouses, but testimony indicated that it would be roughly even with the townhouses' side stoops, which face Montgomery Lane. Moreover, the townhouses' bulk would keep them from being visually overwhelmed by the proposed building.

The Hearing Examiner notes that the surrounding neighborhood in this case contains buildings of widely varying age, height and bulk, including very small, single-family residential buildings, townhouses of different sizes, multi-family housing in high-rise and low-rise buildings, and buildings both large and small containing office, commercial and retail uses. In many cases, completely different types of structures are juxtaposed against one another, much the way the City Homes Townhouses confront the Edgemoor Condominiums and, right next to that building, small two-to-three-story residential structures that have not yet been redeveloped.

Numerous photos and drawings of current conditions demonstrate that even if the Sector Plan has not been implemented in all its particulars, it has led to a pleasing skyline of tall buildings at the Metro Core, with buildings decreasing in height, bulk and density from east to west and north to south. At 60 to 70 feet, the proposed building would continue this step-down in height from the Edgemoor Condominiums, as well as from the Hampden Square building (directly across Woodmont Avenue) and buildings to the northeast.

A binding element commits the Applicant to substantial compliance with the streetscape guidelines contained in the Sector Plan, which is a very important element of compatibility. Streetscape improvements would continue the attractive streetscape on Montgomery Lane and provided a much improved pedestrian environment on Woodmont Avenue.

As discussed in more detail in Part V.B.2. below, the preponderance of the evidence supports a finding that the proposed development would be compatible with land uses and development in the surrounding area from the standpoint of traffic and school impacts.

## **2. Standards and Regulations of the Zone**

The standards and regulations of the TS-R Zone are summarized below, together with the grounds for the Hearing Examiner's conclusion that the proposed development would satisfy each of these requirements.

Section 59-C-8.24, Location. This section repeats Section 59-C-8.21(a), which is discussed in Part V.A.(b)1. above.

### **Section 59-C-8.25, Public facilities and amenities.**

A development must conform to the facilities and amenities recommended by the approved and adopted master or sector plan, including and granting such easements or making such dedications to the public as may be shown thereon or are deemed necessary by the Planning Board to provide for safe and efficient circulation, adequate public open space and recreation, and insure compatibility of the development with the surrounding area, and assure the ability of the area to accommodate the uses proposed by the application.

Property to be dedicated for roadway right-of-way is not clearly indicated on the site layout on the Development Plan. See Ex. 116(b). However, in view of other evidence in the case of the Applicant's intention to provide necessary roadway dedications, the Hearing Examiner does not see this as grounds for denial, but recommends that the Applicant be required to rectify this omission on the Development Plan that is submitted for certification. See page 4, n. 1; Ex. 6.

The textual binding elements specify that the development would substantially comply with the Sector Plan's streetscape recommendations.

Section 59-C-8.3 Land use. No use is allowed except as indicated in the use table . . .

The proposed multi-family dwellings are a permitted use in the TS-R Zone.



Section 59-C-8.4 Development standards.

As shown in the table below, excerpted from the 2004 Staff Report and updated to reflect the application as currently presented, the proposed development would be consistent with development standards for the TS-R Zone.

**Development Standards and Special Requirements for TS-R Zone  
Code §§ 59-C-8.4 and 8.5**

<b>Development Standards</b>	<b>Permitted/ Required</b>	<b>Proposed</b>
Minimum tract area (area to be rezoned)	20,000 sq. ft.	30,891 square feet
Maximum density of dwelling units per acre		
a. Floor area ratio	2.5	Not to exceed 2.5*
b. FAR with bonus for MPDUs	3.05	Not to exceed 3.05*
b. Dwelling units per acre	150 units/acre	70 – 99 units/acre*
c. Gross floor area	94,218 sq. ft.	Not to exceed 94,218 sq. ft.*
Open space		
a. Minimum percentage of net area devoted to public use space	10%	Not less than 10%*
b. Minimum percentage of net lot area devoted to active and passive recreation space.	20%	Not less than 20%.* Area to be provided on the ground to be determined by Planning Board.
c. Total minimum open space	30%	Not less than 30%
d. Maximum building coverage	None	No more than 65%*
Special Requirements <sup>16</sup>		
a. Maximum building height	None	70 feet*
b. Parking to be located so as to have minimal impact on adjoining residential properties		All parking to be underground except possible small number of spaces adjacent to Hampden Lane
Minimum parking (per § 59-E-3.7)	75 spaces	No binding element

\* Denotes binding elements.

Section 59-C-8.51, Building height limit.

The maximum height permitted for any building shall be determined in the process of site plan review. In approving height limits the planning board shall take into consideration the size of the lot or parcel, the relationship of the building or buildings to surrounding uses, the need to preserve light and air for the residents of the development and residents of surrounding properties and any other factors relevant to height of the building.

No findings necessary at zoning.

Section 59-C-8.52, Off-street parking. Parking shall be so located as to have a minimal impact on any adjoining residential properties.

The binding elements specify that residential parking would be underground, which would tend to minimize impacts on adjoining residential properties by eliminating the sight and sounds of above-ground parking. The Applicant intends to explore at site plan the possibility of a small number of drop-off spaces adjacent to or in the right-of-way for Hampden Lane, which is a fairly broad street with low levels of traffic.

Section 59-C-8.52, Streets. Interior streets may be private or public . . .

No interior streets are proposed in this application.

Section 59-C-8.54, Ancillary commercial uses. Ancillary commercial uses . . . may be permitted as follows . . .

No commercial uses are proposed in this application.

**(c) *That the proposed internal vehicular and pedestrian circulation systems and points of external access are safe, adequate, and efficient.***

The uncontroverted testimony of two expert witnesses at the April 2006 hearing, a civil engineer and a traffic engineer, demonstrated that the proposed external access point on Hampden Lane would be safe, adequate and efficient, and would have no adverse impact on pedestrian circulation systems. The only internal vehicular circulation system proposed is an underground parking garage, the specifics of which are not available for review at this stage.

### **3. Maximum Safety, Convenience, and Amenity of the Residents**

With regard to serving the safety, convenience and amenity of residents of the proposed building, Technical Staff note in 2004 that the setback and streetscape provisions along Montgomery and Hampden Lanes would improve the pedestrian connection between Arlington Road and Woodmont Avenue, and that the setbacks, linear open space, streetscape, small urban park and bus stop along Woodmont Avenue would improve the pedestrian connections between the Woodmont Triangle and the Arlington Road District. See Ex. 38 at 13. Some of these features are reduced in

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<sup>16</sup> Additional special requirements in Section 59-C-8.5 address interior streets, which are not proposed for this small site, and ancillary commercial uses, which also are not proposed.

size on the current Development Plan, but the application of Staff's 2004 findings to the present plan is supported by the expert testimony of land planner Malcolm Rivkin at the April 2006 hearing. The Hearing Examiner notes that the textual binding elements specify substantial compliance with the extensive streetscape guidelines provided in the Sector Plan.

As Mr. Rivkin noted, the building would be extremely accessible to Metro, shopping, entertainment and outdoor recreation.

Based on these findings, the Hearing Examiner concludes that the proposed development would provide for the maximum safety, convenience, and amenity of the residents of the development.

#### **4. Compatibility**

As discussed in detail in Part V.A.(b)1. above, the Hearing Examiner concludes that the proposed development would be compatible with land uses in the surrounding area.

- (d) That by its design, by minimizing grading and by other means, the proposed development would tend to prevent erosion of the soil and to preserve natural vegetation and other natural features of the site. Any applicable requirements for forest conservation under Chapter 22A and for water resource protection under Chapter 19 also must be satisfied. The district council may require more detailed findings on these matters by the planning board at the time of site plan approval as provided in division 59-D-3.***

The subject property is located in a highly urbanized area and has few natural features. Technical Staff reports that two existing trees on the site would be removed, but that efforts will be made to preserve trees in the public right-of-way. The application is exempt from forest conservation requirements because of the site's small size and lack of existing forest cover. As noted earlier, if this site is developed, the developer will be required to conform to county requirements for stormwater management. Technical Staff expects such requirements to be met through a structural filtering device to be placed under the service drive. Based on these factors, the undersigned concludes that this paragraph is satisfied.

- (e) ***That any documents showing the ownership and method of assuring perpetual maintenance of any areas intended to be used for recreational or other common or quasi-public purposes are adequate and sufficient***

Condominium association documents that have been submitted in draft form adequately and sufficiently demonstrate the intended ownership and perpetual maintenance of common areas. See Ex. 13.

## **B. Public Interest**

The applicant must show that the proposed reclassification bears sufficient relationship to the public interest to justify its approval. The State Zoning Enabling Act applicable to Montgomery County requires that all zoning power must be exercised:

“. . . with the purposes of guiding and accomplishing a coordinated, comprehensive, adjusted, and systematic development of the regional district, . . . and [for] the protection and promotion of the health, safety, morals, comfort, and welfare of the inhabitants of the regional district.” [*Regional District Act*, Maryland-National Capital Park and Planning Commission Article (Art. 28), Md. Code Ann., § 7-110].

When evaluating the public interest, the District Council normally considers master plan conformity, the recommendations of the Planning Board and Technical Staff, and any adverse impact on public facilities.

### **1. Master Plan, Planning Board and Technical Staff Recommendations**

As discussed above, the Hearing Examiner agrees with the Planning Board and Technical Staff that the subject application would be in substantial compliance with the use and density recommended in the *Bethesda CBD Sector Plan*. Moreover, the evidence amply supports a finding that the proposed development would support the achievement of the “low-rise, high-density, urban village” form of development recommended in the Sector Plan. The building is proposed with a maximum height of 70 feet, five feet above the Sector Plan recommendation of 65 feet. In addition, the Applicant proposes a seven-story building, including an English basement, whereas the Sector Plan recommended six stories in the 65 feet of height.

The Planning Board recommended approval of the original Development Plan, with a maximum height of 100 feet. The 2006 Staff report finds that in light of this recommendation, and the fact that the proposed building would exceed the Sector Plan recommendation by only a small amount, the proposed building would be appropriate for the site. Both the ARC Committee and the Planning Board found that the proposed development would not be financially feasible, with MPDUs on site, within the 65-foot height limit recommended in the Sector Plan. See Ex. 124. The Planning Board specifically recommended that the District Council approved the proposed Development Plan with a maximum height of 70 feet. See *id.*

The Applicant seeks to exceed the height recommended in the Sector Plan by less than ten percent. In other respects, such as streetscape and buildings right on the street, with small setbacks, the proposed development is very consistent with the Sector Plan. In addition, one corner of the building would drop down to 60 feet, reducing the overall mass of the building and its impact on adjacent properties. Moreover, the 70-foot height requested is consistent with the Sector Plan's scheme of higher heights along Woodmont Avenue, and would still provide a noticeable step-down in height from adjacent high-rises to the north and east.

For all of the above reasons, the Hearing Examiner finds that the proposed development would substantially comply with the Sector Plan, and should be approved with a maximum height of 70 feet.

## **2. Impact on Public Facilities: Roadways**

As discussed in detail in Part III.I. above, the Applicant contends that the proposed project would not have an adverse impact on area roadways because it would generate a very small number of trips, below the threshold that requires preparation of an LATR study. The Applicant also relies on Technical Staff's Stage II Memo, Ex. 76(c), a 2004 comprehensive traffic study prepared for the Bethesda-Chevy Chase policy area which found that (i) no intersections in the Bethesda CBD have traffic exceeding the applicable congestion standards; and (ii) measures have been identified to resolved excessive congestion at all intersections in the Bethesda-Chevy Chase policy area save three, all of which are located north of the Bethesda CBD and are unlikely to be noticeably affected by

residential traffic originating in downtown Bethesda. The Stage II Memo, which was endorsed by the Planning Board, concluded that the Bethesda CBD should proceed to Stage II development with a cap on new employment uses, but that traffic conditions did not warrant any cap on residential development. Moreover, Technical Staff's ADAC Report for 2004 (Annual Development Approval and Congestion Report, Ex. 90) found that three intersections along Woodmont Avenue – at Elm Street, Montgomery Lane and Cordell Avenue – are currently operating at levels well below the applicable congestion standard.

The Opposition in the 2004 proceedings argued that the original zoning application should fail because the Applicant did not prepare a traffic study specific to the subject development. See Ex. 93. Those opposition parties now support the present application. Nonetheless, because the argument they put forward in 2004 are part of the evidentiary record, the Hearing Examiner considers it appropriate to address them, at least briefly.

The Opposition in the 2004 proceedings relied, in part, on citations to case law and a 2002 Report and Recommendation by Montgomery County Hearing Examiner Philip Tierney in zoning application No. G-775, Chevy Chase Land Company. See *id.* On this Hearing Examiner's reading, however, the cited authorities do not support the Opposition's arguments.

It is certainly true that rezoning denials based on an applicant's failure to show that anticipated traffic would be compatible with the surrounding area have been upheld. See *Montgomery County v. Laughlin*, 255 Md. 724, 259 A.2d 293 (1969); *Tauber v. Montgomery County*, 244 Md. 332, 223 A.2d 615 (1966); *Montgomery County v. Greater Colesville Citizens Association, Inc.*, 70 Md. App. 374, 521 A.2d 770 (1987). However, the case law merely identifies the applicant's burden to demonstrate a lack of adverse traffic impacts – it does not prescribe particular types of evidence that must be presented.

Hearing examiner reports do not carry the weight of judicial opinions and are not binding on unrelated cases. To the extent that such reports may be considered instructive, however, the undersigned notes that the Hearing Examiner's report in G-775 does not, as suggested by the Opposition, state "categorically" that a compatibility finding cannot be made in a floating zone case if

the applicant has failed to provide a complete traffic study. The report states, rather, that the District Council is **permitted** to consider evidence beyond LATR, and that evidence on traffic safety is linked to a determination of compatibility.

The Opposition in the 2004 proceedings further relied on *Trainer v. Lipchin*, 269 Md. 667, 309 A.2d 471 (1973), for the proposition that zoning approval may be denied based on the public interest if the evidence shows that a development would make existing traffic congestion “slightly worse.” In so doing, the Opposition mischaracterized the holding of that case by removing it from its proper context. The case involved a Euclidian zone, not a floating zone, and the court upheld denial of a rezoning on grounds that traffic *and* other evidence was insufficient to demonstrate that a mistake had been made in the previous comprehensive zoning. There was no discussion of compatibility or the public interest.

The Opposition contended that rezoning should not be approved if the applicant’s only evidence concerning traffic is a statement that the development is expected to generate too few peak-hour trips to require an LATR traffic study. The Hearing Examiner is aware of several cases in which the District Council has approved reclassifications under just such circumstances, relying on the Planning Board’s judgment, contained in the LATR Guidelines, that developments below a certain size do not have a material impact on traffic conditions. It cannot be denied that, cumulatively, several small projects in a given geographic area could have a material impact on traffic conditions. Moreover, the only direction to zoning applicants to rely on LATR standards in presenting a zoning case comes from the Planning Board (see LATR Guidelines), not the District Council. Nonetheless, the District Council has often accepted LATR data as sufficient evidence on traffic. The District Council has considered and should consider additional data related to traffic if presented – LATR need not be the only format for relevant traffic information in support of an application, and opposition parties cannot fairly be prevented from presenting contrary evidence. In the present case, however, we need not decide whether reliance on a finding that traffic would be below the LATR threshold is adequate to support a rezoning, for that is not the posture of the case.

The Applicant in this case presented fairly slim evidence concerning traffic impacts. It did not, however, rely solely on the statement that it would generate too few peak hour trips to require an LATR study. The Applicant presented additional evidence, in the form of the Stage II Memo, the ADAC Report and related testimony, to demonstrate the adequacy of area roadways to support the proposed development. The Opposition during the 2004 proceedings presented *no evidence whatsoever* to suggest that there is significant congestion in the area of the subject site or the Bethesda CBD in general, or that the proposed development would have actual adverse impacts on traffic. The Opposition's efforts to discredit the findings of the Stage II Memo and the ADAC Report were unavailing. These reports are not specific to the subject property or the proposed rezoning, and at this point are arguably outdated, but they did provide valuable information on traffic conditions in the relevant area. Weighing the totality of the evidence, the Hearing Examiner finds the Applicant has adequately demonstrated that the proposed development would not have adverse impacts on area traffic.

### **3. Impact on Public Facilities: Schools**

With regard to potential impact on public schools, in 2004 the Applicant presented a letter from Montgomery County Public Schools ("MCPS") concerning school capacity, as well as evidence that under the Growth Policy, school capacity was considered adequate in the relevant cluster for FY 2005. The Hearing Examiner has taken official notice of the fact that the Planning board has found school capacity to be adequate, under the Growth Policy definition, to support subdivision approval in all clusters in FY 2007. With the maximum of 70 units, the proposed development is expected to generate approximately three elementary school students, one middle school students and one to two high school students. MCPS reports that enrollment is expected to exceed capacity for the entire six-year forecast period in the relevant elementary school. See attachment to Ex. 76(d). Excess enrollment projected in the applicable middle and high schools is expected to be resolved by expansions identified in the FY 2005-2010 Capital Improvements Program. See *id.*

The Opposition during the 2004 proceedings argued that the original application should be denied due to inadequate evidence that there would be no adverse impact on the public schools.



Again, these opposition parties support the present application, but because the evidence and arguments they presented is part of the evidentiary record, the Hearing Examiner considers it appropriate to address them, at least briefly.

The Opposition during the 2004 proceedings argued that the estimate provided for the number of students that would be generated is flawed, because it fails to take into account how many stories a building contains, how many bedrooms the units contain and how many units are MPDUs. Mr. Lavorgna of MCPS explained that it is his agency's standard procedure to use a single student generation rate for all high-rise residential buildings. The Hearing Examiner notes that the Opposition presented no evidence that the standard generation rate used by MCPS is an inaccurate predictor.

The Opposition during the 2004 proceedings argued that AGP capacity calculations should not be relied upon in individual zoning cases because they overestimate school capacity. Cross-examination of Mr. Lavorgna of MCPS and Mr. Hardy of Technical Staff established that MCPS calculates capacity school-by-school, based on school programming and actual classroom usage, while capacity calculations under the AGP are done on a cluster-wide basis and assume the same number of children in each classroom. The AGP methodology results in higher capacity numbers than the MCPS methodology.

The Opposition during the 2004 proceedings also argued that AGP capacity calculations should not be relied upon in individual zoning cases because they are not intended for that purpose. As explained by Mr. Moritz of Technical Staff, the AGP methodology was developed to provide a broad measure of whether school capacity on a cluster-wide basis justifies a moratorium on residential building in a given fiscal year. The evidence indicates that the County Council adopted the AGP practice of assigning the same number of students to each classroom, instead of using actual program data about how classrooms are used, for at least two reasons – to avoid having schools come under pressure to make programming changes either to avoid or to cause a moratorium, and to have more stable numbers over time. This suggests that the AGP methodology may be better suited to its intended purpose than to determining whether an individual development project would have an adverse impact on schools. Moreover, the AGP methodology as established in the FY 2003-05 Policy

Element by its own terms pertains to subdivision applications, not zoning applications. Nonetheless, the methodology behind the AGP capacity calculations reflects the County Council's judgment on the appropriate measurement of the adequacy of school capacity to support residential development. Accordingly, the results of that calculation provide relevant information and should be considered, together with whatever additional evidence is available.

The Opposition during the 2004 proceedings acknowledged that due to its size, the proposed development would generate only a very small number of students, even at the elementary school level. They argued, however, that the proposed rezoning should be denied because adding even a small number of students to an overcrowded school has an adverse impact. They relied for support on *Malmar Associates v. Board of County Commissioners for Prince George's County*, 260 Md. 292, 272 A.2d 6 (1971), in which the court upheld the denial of a density increase based on evidence of school overcrowding. The court in that case made the oft-quoted statement that even a small number of students can cause an adverse impact because "if the cup is already completely full, even one additional drop will make it overflow." 260 Md. at 307. The Opposition failed to recognize that while *Malmar* permits a legislative body to block a development based on even a small addition to an overcrowded school, it does not *require* such a decision. In the present case, the District Council bears the responsibility to decide whether the proposed reclassification should be denied because it would add three students to an elementary school that is over-capacity and is expected to remain so. Based on the small number of students involved and the Council's past decisions in zoning matters, the undersigned does not consider the potential impact on public schools sufficient to justify denial of the application.

As noted by Mr. Rivkin, the proposed development would serve the public interest in increasing the housing stock in the County, which is suffering from increasing housing shortages. See Ex. 9 at 3, Tr. April 2006 at 61-62.

Accordingly, having carefully weighed the totality of the evidence, the Hearing Examiner concludes that approval of the requested zoning reclassification would be in the public interest.

## **VI. CONCLUSIONS**

Based on the foregoing analysis and after a thorough review of the entire record, I reach the conclusions specified below.

### **A. Development Plan**

1. The requested reclassification to the TS-R Zone is in substantial compliance with the use and density recommended by the *Bethesda CBD Sector Plan*. It does not conflict with the county capital improvements program or any other county plan or policy.

2. The Development Plan would comply with the purposes, standards, and regulations of the TS-R Zone, would provide for the maximum safety, convenience, and amenity of the residents of the development and would be compatible with adjacent development.

3. The Development Plan proposes conceptual internal vehicular and pedestrian circulation systems and points of external access that would be safe, adequate and efficient.

4. By its design, by minimizing grading and by other means including environmental restoration and reclamation, the proposed development would tend to prevent erosion of the soil and preserve natural vegetation and other natural features of the site. The application is exempt from forest conservation requirements under Chapter 22A. Requirements for water resource protection under Chapter 19 would be satisfied.

5. The submitted documentation of the intended ownership and method of perpetual maintenance of areas to be used for recreational or other common or quasi-public purposes is adequate and sufficient.

### **B. Zoning Request**

Application of the TS-R Zone at the proposed location would be proper for the comprehensive and systematic development of the County because the proposed development would be compatible with land uses in the surrounding area, would satisfy the purposes, standards and regulations of the zone, and would serve the public interest.

## VII. RECOMMENDATION

I, therefore, recommend that Zoning Application No. G-819, requesting reclassification from the R-10 and R-60 Zones to the TS-R Zone of 22,546 square feet of land comprised of part of Lot 5, Block 24B, Edgemoor subdivision, located at 4802 Montgomery Lane, Bethesda; part of Lot 6, Block 24B, Edgemoor subdivision, located at 4804 Montgomery Lane, Bethesda; part of Lot 8, Block 24B, Edgemoor subdivision, located at 4905 Hampden Lane, Bethesda; and part of Lot 9, Block 24D, Edgemoor subdivision, located at 4901 Hampden Lane, Bethesda, all in the 7th Election District, be **approved** in the amount requested and subject to the specifications and requirements of the final Development Plan, Exs. 116(a) – (c); provided that the Applicant submits to the Hearing Examiner for certification a reproducible original and three copies of the page A0.02 of the Development Plan approved by the District Council, Exhibit 116(b) within 10 days of approval, with all land proposed for dedication as public right-of-way clearly indicated, in accordance with § 59-D-1.64 of the Zoning Ordinance.

Dated: July 14, 2006

Respectfully submitted,

Françoise M. Carrier  
Hearing Examiner